FILE COPY

FILED
FEB 28 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 900 49

HANS MAX HAUPT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HANS MAX HAUPT,
Pro Se.

PAUL A. F. WARNHOLTZ,
FREDERICK J. BERTRAM,
111 W. Washington Street,
Chicago 2, Illinois,
Of Counsel for Petitioner.

The Schaffer Press, Inc.

INDEX.

	PAGE
Petition for writ of certiorari	1
(A) Summary statement of matter involved	2
(B) Statement as to Jurisdiction	4
(C) Questions presented	4
(D) Reasons relied on for allowance of writ and specification of errors	7
(E) Prayer of Petition	14
Brief in Support of Petition:	
I. The opinion below	16
II. Jurisdiction	16
III. Statement of the case	17
IV. Specification of Errors	18
V. Summary of Argument	20
VI. Argument:	
A. The Circuit Court of Appeals failed to apply the principles of law laid down by the United States Supreme Court in the case of Cramer v. United States, 65 S. C. 918, requiring a reversal of the case at bar	23
B. The Circuit Court of Appeals (i. e., the opinion by his Honor, Judge Evans) erred in assuming the functions of a jury. It erred in trying to prove that each and every one of the twelve submitted overt acts was proved in constitutional manner (and beyond a reasonable doubt), in an effort to show that the erroneous instructions to the jury, Nos. 50	

PAGE

VI. Argument (continued):

and 51, were not prejudicial to the defendant, notwithstanding that a general verdict was returned by the jury and, therefore, it could not be determined of which of the overt acts the jury found (beyond a reasonable doubt) the defendant was guilty 31

C. Incompetent evidence was received, and considered, and relied upon (1) by the trial court, (2) by the jury, pursuant to erroneous instructions of the Court, and (3) by the Circuit Court of Appeals, to establish treasonable intent on the part of the defendant. The Petitioner was denied a fair trial by reason of the admission of such incompetent evidence. 34

D. The acts charged in the indictment were legally insufficient to constitute the crime of treason. The defendant's demurrer to the indictment should have been sustained..... 41

E. The Trial Court improperly refused to receive in evidence the Statute of the State of Illinois relating to accessories after the fact, offered on behalf of the defendant..... 45

F. There was not sufficient evidence to submit the case to the jury, and the trial court should have directed a verdict of "not guilty" as to each of the "submitted overt acts" (i. e., overt acts Nos. 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22 and 23) 46

G. Petitioner was deprived of a fair and impartial trial by reason of improper, inflammatory and prejudicial argument to the jury by the Government's attorneys, appealing to passion, prejudice, patriotic emotions and war hysteria 47

VI. Argument (continued):

PAGE

H. The Trial Court committed reversible error in the giving of its charge and instructions to the jury, and in refusing to give proper instructions requested on behalf of the defendant 47

I. Petitioner was deprived of a fair trial by reason of the constraint and exhaustion of the jury, resulting from 28 hours of continuous deliberation without sleep, and without accommodation for rest and sleep 50

J. The petitioner was deprived of a fair trial by the reading to the jury of the testimony of two government witnesses (Hirsh and Robe) and one defense witness (Benedict Short), which was allowed over petitioner's objections twenty-four (24) hours after the submission of the case and the retirement of the jury to consider their verdict 51

K. The verdict of the jury was the result of passion, prejudice, war hysteria and misapprehension of law and fact induced by the errors committed in the trial of the case.... 54

L. The verdict in this case was a general one of "guilty as charged in the indictment", without special findings as to the act or acts on which it rests. Since it is not possible to identify the grounds on which the defendant was convicted, the verdict must be set aside if *any* of the separable acts submitted was legally insufficient or was insufficiently proved by two witnesses as required by the Constitution. (See *Cramer* case.) There was a failure of proof, not only upon the overt acts "withdrawn from the jury," but also upon overt acts "submitted to the jury as possible

VI. Argument (continued):

PAGE

acts of treason." There also were submitted overt acts, which were legally insufficient..... 55

Conclusion 57

Appendix:

(a) Instructions given to jury, upon which error is assigned, and discussion thereof..... 58

(b) Instructions requested by defendant, but refused by the Court, upon which error is assigned, and discussion thereof 77

(c) Overt Acts submitted to the jury, as charged in the Indictment herein 86

TABLE OF CASES CITED.

Bollenbach v. United States, No. 41, October Term, 1945, Opinion delivered January 28, 1946.....34, 50

Cramer v. United States, 325 U. S. 1, 65 S. Ct. 918.....36, 37, 42, 44, 62, 67, 74

United States v. Gooding, 12 Wheat. (25 U. S.) 473, p. 475..... 30

United States v. Greene, 146 F. 803, p. 824.....26, 27

United States v. Wilson, et al., 28 Fed. Cases No. 16,730, pages 699-718, at p. 718..... 30

Text Books Cited.

1 Greenleaf on Evidence, paragraph 13..... 27

Wells on Cir. Ev. C., 2, paragraph 1..... 27

Constitution and Statutes.

Article III, Section 3. Treason. Constitution of the United States 38

Illinois Revised Statutes, 1941, State Bar Ed., Chap. 38, Div. II, Sec. 4, par. 584 (Parents cannot be held as accessories after the fact) 45, 80

Constitution and Statutes (Cont'd)

PAGE

Judicial Code, 240 (a), 28 U.S.C., paragraph 347-(a) . . 4, 16

Sec. 688, Title 18, Criminal Code and Criminal Procedure 4, 16

28 U.S.C., Section 725; R.S. Sec. 721 46

28 U.S.C., Section 729; R.S. Sec. 722 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

HANS MAX HAUPT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Hans Max Haupt, respectfully shows unto the Court as follows:

That he is a resident of the County of Cook and State of Illinois, and is a citizen of the United States of America by naturalization.

That on June 14, 1944, he was sentenced by the District Court of the United States for the Northern District of

Illinois, Eastern Division, upon a judgment of conviction, to imprisonment for life, and to pay a fine of Ten Thousand Dollars ($10,000) and costs, under an indictment charging the crime of treason.

That on appeal from said judgment of said District Court, the Circuit Court of Appeals for the Seventh Circuit, on December 20, 1945, affirmed the said judgment.

That on January 24, 1946, the said Circuit Court of Appeals denied a petition for rehearing filed in said cause.

(A)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner, Hans Max Haupt, defendant below, was indicted for the crime of treason under an indictment filed in Court on February 25, 1944 (Bill of Exceptions 1687-1700). The jury returned a verdict finding the defendant "guilty as charged in the indictment", upon which the Court rendered judgment against the defendant, and the defendant was sentenced on June 14, 1944 to life imprisonment, and to pay a fine of Ten Thousand Dollars ($10,000.00) (Bill of Exceptions 1677-1683). Defendant appealed from said judgment and sentence to the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed the said judgment and sentence on December 20, 1945, and denied defendant's petition for rehearing on January 24, 1946.

The indictment specified twenty-nine alleged "overt acts," which were charged to have been done by the defendant "in the prosecution, performance and execution of said treason" (Bill of Exceptions, 1691-1700).

A demurrer to the indictment was filed on behalf of the defendant (Bill of Exceptions, 1701-1703), and said demurrer was overruled by the trial Judge (Bill of Exceptions, 1707).

A motion to quash and dismiss the indictment was filed on behalf of the defendant (Bill of Exceptions, 1716-1719), and said motion was denied by the Court (Bill of Exceptions, 1720).

At the conclusion of the Government's case, the defendant made and presented a written motion for a directed verdict generally and also specifically as to each of the "overt acts" charged in the indictment (Bill of Exceptions, 1728-1730), all of which motions were denied by the Court (Bill of Exceptions, 1731). The defendant thereupon introduced certain evidence in his defense, and at the conclusion of all of the evidence in the case, the defendant renewed his motion for a directed verdict generally and specifically as to each of the "overt acts" charged in the indictment, which motions were again overruled by the Court (Bill of Exceptions, 1735).

The defendant, at the conclusion of the Government's evidence in the case, and again at the conclusion of all of the evidence in the case, made and presented certain written motions to strike and exclude from the evidence certain testimony of witnesses introduced on behalf of the Government and for instructions to the jury not to consider such testimony, all of which motions were overruled by the Court (Bill of Exceptions, 1731-1739).

Motions, in writing, for a new trial (Bill of Exceptions, 1826-1834) and in arrest of judgment (Bill of Exceptions, 1835-1838) were made on behalf of the defendant, and both of said motions were overruled by the Court.

The Bill of Exceptions consists of four volumes, the first three volumes of which contain the full stenographic transcript of the proceedings of the trial (with the testimony in question and answer form).

(B)

STATEMENT AS TO JURISDICTION.

This Court has jurisdiction to review this cause under Section 240-a of the Judicial Code, as amended, 28 U.S.C. paragraph 347 (a), and Section 688, Title 18, Criminal Code and Criminal Procedure, and Rules 11, 12 and 13 of Criminal Procedure of this Court.

The order and judgment of the Circuit Court of Appeals became final on January 24, 1946, on which date it denied the petition for rehearing.

(C)

QUESTIONS PRESENTED.

1. Were the overt acts which were submitted to the jury each proved by the testimony of two direct witnesses as to the same overt act, as required by the Constitution? (By reason of Instructions Nos. 50 and 51 of the Court's Charge to the Jury and the return of a *general* verdict of guilty, it is conceded in the opinion of the Circuit Court of Appeals, and was also conceded in the Government's supplemental brief, filed October 26, 1945, that failure of proof, or legal insufficiency of any one of the submitted overt acts charged in the indictment, would require a reversal of the case.)

2. May evidence, which according to all decisions constitutes *circumstantial evidence*, be considered *direct evi-*

dence for the purpose of satisfying the constitutional two-witness requirement, when a charge of treason is involved?

3. Did the Circuit Court of Appeals perform the functions of the jury in weighing the evidence as to each submitted overt act, for the purpose of overcoming the effect of Instructions Nos. 50 and 51, which required proof of *one* overt act only, and which were apparently erroneous in view of the general verdict rendered?

4. Were the acts charged in the indictment legally sufficient to constitute the crime of treason? Did the Court err in overruling the defendant's demurrer to the indictment? (Petitioner contends that clearly some of the twelve overt acts charged in the indictment and submitted to the jury were legally insufficient to support a conviction for treason.)

5. Was petitioner denied a fair trial by reason of the admission of incompetent evidence? (Petitioner contends that incompetent evidence was received against him which was prejudicial to his right to a fair trial.)

6. Did the Court improperly refuse to receive in evidence the Statute of the State of Illinois relating to accessories after the fact, offered on behalf of the petitioner?

7. Was the petitioner denied a fair trial by reason of the giving of improper and erroneous instructions in the Court's Charge to the Jury and by reason of the refusal of the Court to give proper instructions requested on behalf of the defendant? (Petitioner assigns error in the giving of instructions Nos. 8, 9, 13, 26, 36, 39, 40, 41, 47, 49, 50, 51, 53, 54, 63, 55, 56, 57, 58, 60, and 61, and in the refusal to give defendant's requested instructions Nos. D-2, D-6, D-23, D-7, D-8, D-15, D-16, D-17, D-19, D-21, D-22, D-27, D-28, D-29 and D-30.)

8. Was the petitioner deprived of a fair and impartial trial by reason of improper, inflammatory and prejudicial argument to the jury by the Government's attorneys, appealing to passion, prejudice, patriotic emotions and war hysteria?

9. Was the verdict of the jury the result of passion, prejudice, war hysteria and misapprehension of law and fact, induced by errors committed in the trial of the case?

10. Was the petitioner deprived of a fair trial by reason of the constraint and exhaustion of the jury, resulting from twenty-eight hours of continuous deliberation without sleep and without accommodation for rest and sleep?

11. Was petitioner deprived of a fair trial by the reading to the jury of the testimony of two Government witnesses (Hirsh and Robe) and of one defense witness (Benedict Short), which occurred over petitioner's objections twenty-four hours after the submission of the case and the retirement of the jury to consider their verdict?

12. Can a general verdict of "guilty as charged in the indictment" sustain a conviction in the case at bar, in view of instructions Nos. 50 and 51, which are to the effect that a verdict of guilty may be rendered on basis of the commission of any one of the twelve submitted overt acts?

13. Did the Circuit Court of Appeals fail to apply the principles of law laid down by this Honorable Court in the case of *Cramer* v. *The United States*, 65 S. Ct. 918, requiring a reversal of the case at bar?

(D)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT AND SPECIFICATION OF ERRORS.

1. The Indictment.

The alleged offenses charged in the indictment do not constitute acts of treason within the meaning of and as defined in the Constitution of the United States, and as stated in Section 1, Title 18, U.S.C.

Twelve of the alleged overt acts were submitted to the jury, and seventeen were "withdrawn." Of the overt acts submitted to the jury, overt acts 10 and 11 (Group One) charge the act of accompanying Herbert Haupt for the purpose of securing employment; overt acts 12, 17, 20, 21, 22 and 23 (Group Two) charge harboring and sheltering Herbert Haupt; overt acts 13, 14, 15 and 16 (Group Three) charge accompanying Herbert Haupt to an automobile sales agency, arranging, making payment and completing arrangements for the purchase of an automobile for Herbert Haupt. Each of said alleged acts is a commonplace, insignificant and colorless action. There is nothing treasonable in the nature of these actions, and we contend that some of these acts are clearly insufficient in law to support a conviction. The "withdrawn" overt acts were likewise insufficient and demurrable.

The trial Court erred in overruling the defendant's demurrer to the indictment herein, and the Circuit Court of Appeals erred in affirming the judgment of the trial Court herein.

2. Errors in Admission of Evidence.

The Court erred in receiving in evidence incompetent and improper testimony and exhibits prejudicial to the rights of the defendant; and the Court further erred in denying the defendant's several motions to exclude the same from the consideration of the jury.

(a) *Concerning conversations and occurrences which happened from one to six years prior to the time of overt acts charged in the indictment, admitted in evidence "to prove the intent with which the overt acts were committed"*:

The Court erred in admitting in evidence the testimony of witnesses William Schroeder, Mrs. Louis Fishman, Hans Poppe and Barbara Kluczyk, regarding *pre-war conversations* alleged to have been had with the defendant, each being a separate conversation related by only one witness.

(b) *Concerning oral statements and alleged admissions made by the defendant, while in custody, which admissions were inadmissible under the Constitution as the same were not made in open Court*:

The Court erred in admitting in evidence the testimony of FBI Agents Hirsh and Robe and of the convicts Majerczak and Hamby regarding oral conversations of the defendant, which constituted admissions or confessions *not made in open Court* with respect to overt acts charged in the indictment, contrary to the provision of the Constitution that "no person shall be convicted unless on the testimony of two witnesses to the same overt act, or on confession in open Court."

(c) *Concerning occurrences and conversations which took place outside of the presence of the defendant*:

The testimony of the witness Ernest Peter Burger regarding conversations and instructions orally given, all outside of the presence of the defendant, was inadmissible under the hearsay evidence rule, and the Court erred in overruling defendant's motion to exclude the testimony. The Court further erred in permitting said witness to testify, over defendant's objections, to the movements of the witness himself and of his own group, after the departure of Herbert Haupt, and outside of his presence. The testimony of Burger was admitted for the sole purpose of proving the enemy status of Herbert and not as evidence against the defendant; and yet, after it was so received, not only the jury, but the Circuit Court of Appeals, were unable to refrain from regarding it as evidence against the defendant to establish a treasonable motive for an otherwise colorless act of the defendant. (See C. C. A. opinion, pages 32 and 33.)

The Court also erred in admitting the testimony of witnesses William Leibl, Joseph William Haas, Carl Eggert and Dora Eggert, relating to hearsay evidence and matters occurring outside of the presence of the defendant.

(d) *Concerning improper examination and intimidation of the witness, Gustave Zermer, by the Government's attorney, and improper offer of testimony by the prosecution regarding overt acts charged in the indictment with knowledge on the part of the prosecution that two witnesses to such act would not be produced, as required by the Constitution*:

The Court erred in overruling objections of the defendant's counsel to the method of examination and intimidation of the witness, Gustave Zermer, which was prejudicial to the right of the defendant to a fair trial. It was improper for the prosecution to offer the testimony of *one witness* in support of overt acts which they knew could not be proved by two witnesses and would have to be withdrawn, and when the only purpose of such testimony could be its effect upon the jury in connection with the proof of the overt acts to be submitted to the jury.

(e) *It was error for the Court to receive in evidence, and to submit to the jury, testimony relating to "withdrawn" overt acts for consideration by the jury in determining the question of the intent with which the defendant may have committed any of the "submitted" overt acts charged in the indictment.*

Withdrawn overt acts Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 18, 19, 24, 25, 26, 27, 28 and 29, were not, nor were any of them, supported by the testimony of two witnesses. It was improper to charge the jury that they could use any evidence relating to any such acts to obtain a conviction upon any overt act submitted to the jury. The Constitution peremptorily states that "no person shal be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court." It was improper for the prosecution to offer the testimony of *one witness* in support of overt acts which they knew could not be proved by two witnesses and would have to be withdrawn, and when the only purpose of such testimony was to create prejudice against the defendant with respect to the overt acts to be submitted, and which submitted acts were of an innocent nature in themselves.

3. Error in Refusing to Receive Evidence.

The Court improperly refused to receive in evidence the Statute of the State of Illinois relating to accessories after the fact, offered on behalf of the defendant.

The Illinois Statute was pertinent and material to the defense of the defendant to the overt acts charging him with harboring and sheltering his son. We contend that under the Federal Statutes, U. S. Code, Title 28, Sections 725 and 729, the Statutes of the State, wherein a Federal trial is held, are to be regarded as rules of decision and controlling when not inconsistent with the Constitution and laws of the United States; and we further contend that the Illinois statute, i.e., Chap. 38, Div. II, Sec. 4, para. 584, is not inconsistent with the Constitution and laws of the United States.

4. Sufficiency of the Evidence.

(a) There was not sufficient evidence to submit the case to the jury, and the Court should have directed a verdict of "not guilty" as to each of the "submitted overt acts," (i.e., overt acts Nos. 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22 and 23).

(b) The Court erred in overruling the defendant's motion for a new trial.

(c) The Court erred in overruling the defendant's motion in arrest of judgment.

5. Instructions Given and Refused.

(a) The Court committed reversible error in the giving of its charge and instructions to the jury.

The defendant assigns error in the giving of the following numbered instructions in the Court's Charge to the Jury:

Instruction Nos. 9, 13, 26, 36, 39, 40, 41, 47, 50, 51, 53, 54, 55, 56, 57, 58, 60, 61

(b) The Court erred in refusing to give to the jury certain instructions requested on behalf of the defendant, to-wit:

Refused Instruction: D-2, D-6, D-23, D-7, D-8, D-15, D-16, D-17, D-19, D-21, D-22, D-27, D-28, D-29 and D-30.

(c) The Charge to the Jury, as a whole, failed to instruct the jury properly upon the defense theory that acts done by defendant merely to aid and comfort his son as an individual, without intention to aid the enemies of the United States, would not amount in law to the crime of treason; and the Court's Charge to the Jury did, in fact, deprive the defendant of such defense.

(See Instructions Nos. 53 and 54, which nullify and cancel out the Court's proper Instruction No. 37 on this subject).

(d) The Court erred in sending into the jury room for the consideration of the jury a copy of the indictment, containing as it did a prejudicial and hurtful narrative, made up of many allegations of prejudicial matter irrelevant to the alleged overt acts of the defendant, and made up of many allegations concerning alleged overt acts upon which there was no evidence, or insufficient evidence, and which were withdrawn from the jury.

(e) The Court erred in sending into the jury room for the consideration of the jury, the Court's Charge to the Jury, in typewritten form, thereby accentuating all the

errors contained in the instructions in said Charge to the Jury, and particularly the errors contained in paragraphs 53, 54 and 63 of said Charge, which were inconsistent with and nullified the effect of the instruction in paragraph 37 of said Charge to the Jury.

6. Prejudicial Argument by Government's Counsel.

The Government's attorneys in their arguments to the jury, made inflammatory, prejudicial, impertinent, irrelevant and improper argument and comments not founded upon evidence in the case, but appealing to passion, prejudice, patriotic emotions and war hysteria, and depriving the defendant of a fair and impartial trial.

7. The Verdict of the Jury.

(a) The verdict of the jury was the result of passion, prejudice, war hysteria and misapprehension of law and fact by the jury, induced by erroneous instructions and by improper argument to the jury and other prejudicial errors committed in the trial of the case.

(b) The verdict was further induced by the physical constraint and exhaustion of the jury resulting from twenty-eight hours of continuous deliberation of the jury without sleep, and without accommodation for rest and sleeping.

(c) The verdict was further induced by the erroneous and improper reading to the jury, over defendant's objections and twenty-four hours after the submission of the case to the jury and their retirement to consider their verdict, of the testimony of two Government witnesses (Hirsh and Robe) and of one defense witness (Benedict Short).

8. The General Verdict.

The sentence herein cannot rest upon a general verdict of "guilty as charged in the indictment" without any finding by the jury as to the particular overt act, or acts, of which the defendant was guilty.

The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which the defendant was convicted, the verdict must be set aside if any one of the separable acts submitted was legally insufficient, or insufficiently proved by two witnesses, as required by the Constitution. There was a failure of proof, not only upon the overt acts "withdrawn from the jury," but also upon overt acts "submitted to the jury" as possible acts of treason. Also, it is plain that a number of the submitted overt acts are legally insufficient to constitute treason.

(E)

PRAYER OF PETITION.

Wherefore, your petitioner respectfully prays that the writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and transmit to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, Number 8607, *United States of America* v. *Hans Max Haupt*, that the judgment of said Court may be reversed and that the judgment of conviction of the Dis-

trict Court of the United States for the Northern District of Illinois, Eastern Division, may be reversed by this Honorable Court; that your petitioner may have leave to proceed herein *in forma pauperis,* in accordance with his motion heretofore filed herein; and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper; and your petitioner will ever pray.

Hans Max Haupt

Hans Max Haupt, *Petitioner, Pro se.*

Of Counsel:
PAUL A. F. WARNHOLTZ,
111 W. Washington St.,
Chicago 2, Illinois.

FREDERICK J. BERTRAM,
111 W. Washington St.,
Chicago 2, Illinois.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINION BELOW.

The opinion of the United States Circuit Court of Appeals rendered in this cause, together with the dissenting opinion of Judge Major, is found in the transcript of the Circuit Court of Appeals proceeding at page 9. A further dissenting opinion was written by Judge Major to the order denying the Petition for Rehearing in the Court of Appeals. The case is reported as *United States* v. *Hans Max Haupt* in 152 Fed. (2d) 771.

II.

JURISDICTION.

This Court has jurisdiction to review this cause under Section 240 (a) of the Judicial Code, as amended, 28 U.S.C., Paragraph 347 (a), and Section 688, Title 18, Criminal Code and Criminal Procedure, and rules 11, 12 and 13 of Criminal Procedure of this Court.

The order and judgment of the Circuit Court of Appeals became final on January 24, 1946, on which date it denied the Petition for Rehearing.

III.

STATEMENT OF THE CASE.

The petitioner was charged with the crime of treason in an indictment which specified twenty-nine (29) alleged overt acts of treason, in giving aid and comfort to his son, Herbert Haupt, an enemy of the United States. Twelve of these alleged overt acts were submitted to the jury as "possible overt acts of treason."

The overt acts submitted to the jury in this case, charge as treason three groups of acts, namely:

1. Accompanying Herbert Haupt for the purpose of assisting him in securing employment (Overt acts 10 and 11);
2. Harboring and sheltering Herbert Haupt (Overt acts 12, 17, 20, 21, 22 and 23);
3. Accompanying Herbert Haupt to an automobile sales agency, arranging and paying for the purchase of an automobile for Herbert Haupt (Overt acts 13, 14, 15 and 16).

The text of said overt acts submitted to the jury is set out in the appendix to this brief.

The Government's evidence, offered in support of the submitted overt acts, as well as that which was offered in support of the alleged overt acts which were "withdrawn" from the jury, could not be set out fairly or properly in any concise statement, nor could the expense of printing a fair statement of the evidence in the case be met by the petitioner.

(The Government's evidence is set forth on pages 5 to 69, inclusive, in the appellant's original brief filed in the United States Circuit Court of Appeals, and the defendant's evidence is set forth on pages 69 to 77, inclusive, of said appellant's brief. The propositions of law and authorities relied upon, including a consideration of the questions here presented, are contained in said brief on pages 98 to 244, inclusive.)

Petitioner, in amplification of this statement, and in support of his petition herein, submits herewith ten copies of the brief filed on his behalf in the said Circuit Court of Appeals.

IV.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Seventh Circuit, erred in affirming the judgment of the District Court.

The trial Court erred (1) in overruling defendant's demurrer to the indictment; (2) in receiving incompetent and improper evidence; (3) in refusing to receive proper evidence offered on behalf of the defendant; (4) in overruling defendant's motions for a directed verdict at the close of the Government's case and again at the close of all of the evidence in the case; (5) in giving erroneous and improper instructions in its charge to the jury and in refusing to give proper instructions requested on behalf of the defendant; (6) in permitting improper prejudicial argument by the Government's attorneys; (7) in refusing to set aside the verdict of the jury and to grant a new trial by reason

of the errors committed in the trial of the case to the prejudice of the right of the defendant to a fair and impartial trial; and (8) in entering judgment upon a general verdict of "guilty as charged in the indictment", where it was not possible to identify the grounds, or the particular alleged overt act or acts of which the jury found the defendant guilty, and where there was a failure of proof "by two witnesses to the same overt act", not only as to the overt acts "withdrawn from the jury", but also as to overt acts "submitted to the jury as possible acts of treason" and where certain, if not all, of said submitted overt acts were legally insufficient to constitute the crime of treason.

V.

SUMMARY OF ARGUMENT.

A.

The Circuit Court of Appeals failed to apply the principles of law laid down by the United States Supreme Court in the case of Cramer v. United States, 65 S. Ct. 918, requiring a reversal of the case at bar.

B.

The Circuit Court of Appeals (i.e., the opinion by his Honor, Judge Evans) erred in assuming the functions of a jury. It erred in trying to prove that each and every one of the twelve submitted overt acts was proved in constitutional manner (and beyond a reasonable doubt), in an effort to show that the erroneous instructions to the jury, Nos. 50 and 51, were not prejudicial to the defendant, notwithstanding that a general verdict was returned by the jury and therefore, it could not be determined of which of the overt acts the jury found (beyond a reasonable doubt) the defendant was guilty.

C.

Incompetent evidence was received, and considered, and relied upon (1) by the trial Court, (2) by the jury, pursuant to erroneous instructions of the Court, and (3) by the Circuit Court of Appeals, to establish treasonable intent on the part of the defendant. The petitioner was denied a fair trial by reason of the admission of such incompetent evidence.

D.

The acts charged in the indictment were legally insufficient to constitute the crime of treason. The defendant's demurrer to the indictment should have been sustained.

E.

The trial Court improperly refused to receive in evidence the Statute of the State of Illinois relating to accessories after the fact, offered on behalf of the defendant.

F.

There was not sufficient evidence to submit the case to the jury, and the trial Court should have directed a verdict of "not guilty" as to each of the "submitted overt acts" (i.e., overt acts Nos. 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22 and 23).

G.

Petitioner was deprived of a fair and impartial trial by reason of improper, inflammatory and prejudicial argument to the jury by the Government's attorneys, appealing to passion, prejudice, patriotic emotions and war hysteria.

H.

The trial Court committed reversible error in the giving of its charge and instructions to the jury, and in refusing to give proper instructions requested on behalf of the defendant.

I.

Petitioner was deprived of a fair trial by reason of the constraint and exhaustion of the jury, resulting from 28 hours of continuous deliberation without sleep, and without accommodation for rest and sleep.

J.

The petitioner was deprived of a fair trial by the reading to the jury of the testimony of two Government witnesses (Hirsh and Robe) and one defense witness (Benedict Short), which was allowed over petitioner's objections twenty-four (24) hours after the submission of the case and the retirement of the jury to consider their verdict.

K.

The verdict of the jury wa the result of passion, prejudice, war hysteria and misapprehension of law and fact induced by the errors committed in the trial of the case.

L.

The verdict in this case was a general one of "guilty as charged in the indictment", without special findings as to the act or acts on which it rests. Since it is not possible to identify the grounds on which the defendant was convicted, the verdict must be set aside if ANY of the separable acts submitted was legally insufficient or was insufficiently proved by two witnesses as required by the Constitution. (See Cramer case.) There was a failure of proof, not only upon the overt acts "withdrawn from the jury", but also upon overt acts "submitted to the jury as possible acts of treason." There were, also, submitted overt acts, which were legally insufficient.

VI.

ARGUMENT.

MAY IT PLEASE THE COURT:

A.

The Circuit Court of Appeals failed to apply the principles of law laid down by the United States Supreme Court in the case of Cramer v. United States, 65 S. Ct. 918, requiring a reversal of the case at bar.

JUDGE MAJOR'S DISSENTING OPINION.

His Honor, Judge Major, in his dissenting opinion herein, makes the following comment regarding the opinion written by Judge Evans:

> "The opinion by which this judgment is to be affirmed is a striking illustration that the fear entertained by the makers of the Constitution was well founded. The reasoning of the opinion is, in my judgment, so grievously and palpably erroneous that I find myself compelled to dissent. The opinion states that it is 'unfortunate that the trial occurred before the decision in Cramer v. United States.' Presumably this means that the trial Court would have tried the case on a different theory if it had had the benefit of that decision. I doubt not that such would have been the case. In this connection, it can be said with equal propriety that it is even more unfortunate that the majority of this Court in their zeal to affirm this conviction have been faced with the law of treason as announced in that decision.
>
> Defendant was entitled to have the question of his guilt determined by a jury in accordance with the law and the Constitution pertaining to treason. As I view

the matter, the function of this Court is confined solely to the question as to whether his guilt was thus determined. If not, the judgment should be reversed, irrespective of any personal opinion we may entertain on that issue. Any other view amounts to usurpation of the province of the trial Court and the jury. If this view be correct, the conclusion to affirm receives little, if any, support from the voluminous recitals of the opinion designed to show that the defendant is guilty." • • •

"In my opinion, the constitutional provision on treason has been nullified and the decision of the Supreme Court in the Cramer case (both the majority and minority opinions) emasculated. This is so, notwithstanding that the opinion is replete with numerous protestations to the contrary.

I would reverse the judgment."

FURTHER COMMENT OF JUDGE MAJOR IN HIS DISSENT TO DENIAL OF PETITION FOR REHEARING.

"If the law requires proper proof as to all the submitted overt acts, as I think it does and as the Government conceded in this Court, a reversal is required even though all of such submitted overt acts have been properly proven. (As originally shown, I disagree with the conclusion of the majority that all of the submitted overt acts were properly proven.) This is so for the reason that the case was tried and submitted to the jury on the theory that proper proof of one act was sufficient to authorize a conviction. If proper proof of all the acts is required, then the theory on which the case was submitted to the jury is erroneous, and prejudicially so.

I would allow the petition for rehearing and reverse the judgment."

Hereafter, we dwell more fully on this subject matter of the Circuit Court of Appeals usurping the functions of a jury, by condoning the erroneous instructions Nos. 50 and 51 (in view of a general verdict) through a finding of its own, that the defendant committed *with treasonable intent* each and every one of the submitted overt acts.

GENERAL COMMENT ON THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The appeal in the case at bar was heard before the Honorable Judges Evans, Kerner and Major of the Circuit Court of Appeals for the Seventh Circuit. Judge Kerner stated that he concurred "in affirming the judgment, but not in all that is said in the opinion." Judge Major filed a dissenting opinion. The statements or reasoning of the opinion written by Judge Evans, which are concurred in by Judge Kerner, are not ascertainable. It is difficult, therefore, to consider any particular part of the opinion of Judge Evans as being the opinion of the majority of the Court. This may also account for the fact that this case is apparently one of the few cases in the Federal Reporter which has been reported without a single law head note.

(a) *Concerning sufficiency of proof by two witnesses of overt acts 12, 20, 21, 22 and 23, charging harboring.*

It is our contention that not a single one of these overt acts has been proven by the direct testimony of two witnesses. Not a single witness saw Hans Haupt, the defendant, or Herbert Haupt, his son, inside of the Haupt apartment; being one of the six apartments located in an apartment building served by two house entrances, each entrance leading to more than one apartment.

Judge Evans, on page 26 of the original opinion, sums up the testimony of a number of persons, relating circumstances from which it could be logically inferred that Herbert Haupt was using and living in the apartment occupied by the petitioner and his wife, and then states that such testimony

> "is *direct* testimony that said son was being quartered in the father's home. To call such evidence circumstantial, rather than direct, is the extreme of tenuity. Such was not the protection intended to be accorded by the Constitution to one charged with treason, when it required the testimony of two witnesses to the same overt act. It is worthy of passing note that it is the decision in the Cramer case, not the definition found in the Constitution, which adds the necessity of '*direct* evidence.' We must, however, and do follow the Court holding."

Notwithstanding Judge Evans' contrary view, testimony to the effect that the entry or exit of Hans Haupt or Herbert Haupt was made through such apartment house entrance, can only be and does constitute merely *circumstantial evidence* and not direct evidence as to harboring of Herbert by Hans Haupt inside of his apartment. Merely by inference can it be stated that Herbert Haupt, after the entry through the apartment house entrance, went into the apartment of his father and mother, or that Hans Haupt was present in said apartment at such time or times.

It should be observed that the fact testified to by the F.B.I. Agents were merely as to *entry to the apartment building* and not as to any conduct of the defendant or of any act of "harboring" by the defendant.

> "'Direct' and 'circumstantial' evidence differ merely in their logical relations to the fact in issue. Evidence as to the existence of the fact is 'direct'. 'Circumstan-

tial" evidence is composed of facts which raise a logical inference as to the existence of the fact in issue." *United States* v. *Greene,* 146 F. 803, 824.

1 Greenleaf on Evidence, paragraph 13, defines direct evidence as being given when the thing to be proved is directly attested by those who speak from their own knowledge of its existence; circumstantial, when the thing to be proved is to be inferred from other facts satisfactorily proved. See also, *Wells, on Cir. Ev. C. 2, paragraph 1.*

The defendant's contention in the case at bar is not only that there is no *direct* proof that Herbert was actually in the Haupt apartment, the F.B.I. testimony being *circumstantial* proof, but also that there was no direct proof (save in the case of Overt Act No. 17) that the defendant himself was in the apartment *at any time when Herbert was supposed to be there.*

As was pointed out by his Honor, Judge Major, in his dissenting opinion herein (page 55):

> "Every word uttered by these witnesses which proved or tended to prove that Herbert Haupt was in the home of the defendant (the third floor apartment) on June 27, 1942, is purely circumstantial. There is not a word of direct proof in support thereof. More than that, it should not be overlooked that Hans Max Haupt and not Herbert Haupt is the defendant in this case, and there is not a scintilla of testimony, either direct or circumstantial, that the former was either in or about the apartment on this date. In fact, his name is not even mentioned by the witnesses. Just how the defendant was shown, by the direct testimony of two witnesses, to have committed this act, without even a mention of his name, is one of the several imponderabilities presented by the majority opinion."

Other than as to the occasion specified in Overt Act 17, there were no witnesses to the presence of the defendant in the apartment at the same time with Herbert, or regarding any *act of the defendant* relating to the charge of harboring Herbert.

The opinion of Judge Evans, at page 32, with respect to the "harboring and sheltering overt acts" states that "there can be little doubt that on the respective dates alleged, the son, Herbert, stayed over night in his father's home, ate meals there," etc. The probability of the fact is not the point of inquiry, but the question is whether the defendant is to be denied the benefit of the Constitutional provision that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act".

Here, as stated in *Cramer* v. *United States*, 65 S. Ct. 918, at page 938, "It is not relevant to our issue to appraise weight or credibility of the evidence apart from determining its constitutional sufficiency."

There being no direct evidence or testimony of two witnesses (nor even of one witness) *to acts of harboring by the accused* at the times and places charged in Overt Acts 12, 20, 21, 22 and 23, he was entitled to such a finding and to a dismissal of such charges either by the trial Court or by the Circuit Court of Appeals upon his appeal herein. As pointed out in Judge Evans' opinion, but not followed, failure of proof on *any* of the submitted overt acts requires a reversal of the case. —

(b) *Concerning sufficiency of proof by two witnesses of Overt Act No. 16, charging the making of a further payment in cash towards the purchase of an automobile and completing arrangements for the*

purchase of said automobile, and purchasing an automobile for the enemy, Herbert Haupt, on June 24, 1942:

There was but *one witness* to this alleged overt act, namely, the salesman, Farrell. It is considered by the Court, in Judge Evans' opinion, pages 17 and 18, that the testimony of the general manager, Vinson, regarding receiving money from some unspecified source, was direct testimony to the act of Hans Haupt paying over such money. However, there is no actual testimony by Vinson that he saw Hans Haupt pay over the particular money, or any money, on June 24, 1942. The Government established by definite questions put to Farrell (one witness, only), that Hans Haupt paid the sum of $405.00 on the evening of June 24, 1942, but Government's counsel avoided such questioning of the witness Vinson, who testified, as shown in the foot note on page 18 of the opinion as follows:

"Q. And you said on that occasion you didn't talk to them yourself? A. No.

Q. Did you receive the money that had been put down? A. I did.

Q. On that evening? A. Yes."

He was not asked and he did not state from whom he received the money. In fact, Vinson merely testified that he saw Hans and Herbert Haupt come into the sales room on June 24th and did not talk to them. Concerning the note mentioned in the testimony, it is clear that the same was signed on June 23rd, 1942, when the mortgage was made out, and not on June 24th, 1942.

The Overt Act No. 16, as charged in the indictment, states that on June 24th, 1942, Hans Max Haupt "made a further payment * * * and did purchase said automo-

bile for said enemy Herbert Haupt * * *." An overt act must be proved as laid by the direct evidence testimony of two witnesses. (*Cramer v. United States*, 65 S. Ct. 918.) There was no second witness who testified that he *saw* Hans Max Haupt make such payment. And there was *no second witness* who testified that Hans Haupt purchased the automobile "for said enemy Herbert Haupt." Witness Vinson testified as follows:

> "Q. Just a minute. Do you know who purchased the car? A. Yes, Hans Haupt.
>
> Q. And was there any conversation as to whether it was a car for Hans or for someone else? A. No." (Bill of Exceptions, 470.)

The act was not proved as laid and as required by the Constitution of the United States, as it was necessary for the Government to prove by two witnesses that the car was purchased *for Herbert Haupt.*

In *United States* v. *Gooding*, 12 Wheat. (25 U. S.) 473, at page 475, the Court said:

> "The case of treason stands upon a peculiar ground; there the overt acts must by statute be specially laid, and must be proved as laid."

In *United States* v. *Wilson, et al.*, 28 Fed. Cases No. 16,730, pages 699-718, at page 718, the Court said:

> "The overt act charged is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties."

(c) *Concerning sufficiency of proof by two witnesses of Overt Acts Nos. 10 and 11, charging defendant with accompanying Herbert to assist him in securing re-employment by the Simpson Optical Company:*

No witness whatever offered any proof that the defendant assisted or attempted to assist Herbert Haupt to secure such employment.

On page 28, his Honor, Judge Evans, states in his opinion:

> "There can be no doubt that the father * * * sometimes volunteered information as the son's whereabouts in the interval since he left the employ of the company, or that the son had now registered for the draft, etc. This was established by the testimony of two witnesses."

Judge Evans is in error in making the foregoing statement, as *not even a single witness* present at the visits of the three Haupts at either Koch's or Grunau's home testified that Hans Haupt spoke one single word about his son's whereabouts in the interval since he left the employ of the Simpson Optical Company. And concerning Herbert's registration for the draft, only *one witness*, Mr. Koch, testified, as follows:

> "At that time Hans Haupt said, 'I sent him out this morning to the draft board and the F.B.I.'" (Bill of Exceptions, 368-373 and 421-424.)

These are the only words uttered by Hans Haupt according to the testimony, relating to overt acts Nos. 10 and 11.

B.

The Circuit Court of Appeals (i.e., the opinion by his Honor, Judge Evans) erred in assuming the functions of a jury. It erred in trying to prove that each and every one of the twelve submitted overt acts was proved in constitu-

tional manner (and beyond a reasonable doubt), in an effort to show that the erroneous instructions to the jury, Nos. 50 and 51, were not prejudicial to the defendant, notwithstanding that a general verdict was returned by the jury and therefore, it could not be determined of which of the overt acts the jury found (beyond a reasonable doubt) the defendant was guilty.

Judge Evans, in his opinion on page 45, states:

> "The most seriously argued objection to the charge arises out of instructions 50 and 51. In essence, these instructions told the jury that they were to find the defendant guilty if they found he performed any *one* of the treasonable overt acts submitted, to which acts two witnesses had testified. A plurality of overt acts was submitted. A general verdict was returned. The Cramer case (in footnote 45), 325 U. S. 1, 36, states a general verdict must be set aside 'if any of the separable acts submitted was insufficent.'
>
> "If it were not for the fact that our study of the evidence as summarized above supports the jury's verdict of guilt on *any* or all of the overt acts submitted, reversal would on this theory follow. We have reached the conclusion that each of the overt acts submitted to the jury was legally (or constitutionally) sufficient."

The error of the Circuit Court of Appeals opinion in this regard is most clearly and effectively demonstrated in the dissenting opinion of his Honor, Judge Major, which we take the liberty of quoting, in part, as follows:

> "Defendant was entitled to have the question of his guilt determined by a jury in accordance with the law and the Constitution pertaining to treason. As I view the matter, the function of this Court is confined solely to the question as to whether his guilt was

thus determined. If not, the judgment should be reversed, irrespective of any personal opinion we may entertain on that issue. Any other view amounts to usurpation of the province of the trial Court and the jury. If this view be correct, the conclusion to affirm receives little, if any, support from the voluminous recitals of the opinion designed to show that the defendant is guilty. * * * An affirmance under such a situation means that the defendant has had a trial by this Court on the acts submitted but not a trial by jury. * * * In order to sustain the conviction on the former theory, it was held that all of the submitted overt acts had been properly proven by the direct testimony of two witnesses. In doing so, however, the opinion treats and holds as direct proof that which is purely circumstantial. In sustaining the Court's instructions to the jury, the theory on which the case was presented to this Court, including the express concession of Government's counsel, has been repudiated. I am unable to join in a result brought about by such inconsistent and illogical reasoning. In my opinion, the constitutional provision on treason has been nullified and the decision of the Supreme Court in the *Cramer* case (both the majority and minority opinions) emasculated. This is so, notwithstanding that the opinion is replete with numerous protestations to the contrary. I would reverse the judgment."

It is evident from Judge Major's comments and references to the opinion of the Court by Judge Evans, that the majority of the Circuit Court of Appeals (Judges Evans and Kerner) misconceived the function of the Appeals Court with respect to determining the defendant's guilt from the record.

This Honorable Court had occasion to re-iterate and clarify the rule regarding the respective functions of the

—Court of Appeals and of the jury in the recent case of *Bollenbach* v. *United States*, No. 41, October Term, 1945, opinion delivered January 28, 1946, where Mr. Justice Frankfurter, who delivered the opinion of the Court, said on page 6:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. * * * In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

C.

Incompetent evidence was received, and considered, and relied upon (1) by the trial Court, (2) by the jury, pursuant to erroneous instructions of the Court, and (3) by the Circuit Court of Appeals, to establish treasonable intent on the part of the defendant. The petitioner was denied a fair trial by reason of the admission of such incompetent evidence.

It is a remarkable fact, but true, nevertheless, as we believe, *that incompetent evidence was used exclusively, or almost so*, by the trial Court, by the jury (under erroneous instructions) and by the Circuit Court of Appeals in its opinion, *to establish the essential element of treasonable intent and purpose on the part of the defendant.*

The sources used and relied upon (improperly) to convict the defendant and to establish his treasonable intent were (1) the so-called background evidence, consisting of pre-war statements of the accused, testified to by single witnesses; (2) withdrawn overt acts testified to by one witness, or in some cases by no witness at all; (3) testimony of witnesses (Hamby, Majerczak, Hirsh and Robe) concerning alleged admissions or confessions of the accused *which were not made in open court;* and (4) testimony of witness Burger and Government exhibits, both of which were received in evidence for the sole and exclusive purpose of showing that Herbert Haupt was and came to the United States as an enemy of our country.

1. The so called background evidence, consisting of *pre-war* statements alleged to have been made by the accused, was testified to, in separate instances, by witnesses Schroeder, Fishman, Poppe and Barbara Kluczyk. It was entirely irrelevant to the overt acts alleged in the indictment and was so remote in time that some of the alleged statements of the accused occurred as much as six years prior to the time of the overt acts charged in the indictment. The statements were withal of a highly prejudicial nature, which could not help but prejudice a jury against the defendant. This incompetent testimony was received over the strenuous objections of defendant's counsel, and is set out in Appellant's original brief in the Circuit Court of Appeals on pages 132 to 150, to which reference is here respectfully made.

None of the pre-war statements of the accused, testified to by individual witnesses, was corroborated by any other witness.

This Honorable Court, in the case of *Cramer* v. *United States*, 65 S. Ct. 918, at page 935, held:

> "The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness."

and on page 934, your Honors said:

> "But the protection of the two-witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given."

and the use of pre-war statements of the accused to convict him was especially criticized in your Honor's opinion, at page 939, viz.:

> "To use pre-war expressions of opposition to entering a war to convict of treason during the war is a dangerous procedure at best."

2. It was error for the trial Court to receive in evidence, and to submit to the jury testimony relating to "withdrawn" overt acts for consideration by the jury in "*determining the question of the intent with which the defendant may have performed • • • overt acts submitted to your consideration and not withdrawn*". (See Instruction No. 49 of the Court's Charge to the Jury.) Seventeen overt acts alleged in the indictment were "withdrawn" (*sic*). Some of them were testified to by only one witness, others by no witness whatever, and all were considered insufficiently proved according to legal and constitutional requirements. Yet the Court submitted these acts in Instruction No. 49, for the jury's special consideration of the "question of intent" of the accused in performing the submitted overt acts.

This Honorable Court, in reversing the *Cramer* case, said:

> "We cannot sustain a conviction for the acts submitted on the theory that, even if insufficient, some unsubmitted ones may be resorted to as proof of treason. Evidence of the money transaction serves only to show how much went out of the case when it was withdrawn." *Cramer* v. *United States*, 65 S. Ct. 918, 937.

With respect to Overt Acts Nos. 18 and 19, which were withdrawn with the others, in the manner aforementioned, petitioner assigns further error because of improper examination and intimidation of the witness, Gustave Zermer, by the Government's attorney. This objection is set out in Appellant's original brief on pages 169 to 171, inclusive, to which reference is here respectfully made.

3. The trial Court erred in admitting in evidence the testimony of F.B.I. Agents Hirsh and Robe and of Federal convicted prisoners Hamby ad Majerczak, regarding oral statements of the defendant, which constitute admissions or confessions *not made in open Court*, contrary to the prohibition of the Constitution.

The trial Court permitted, over defendant's objections, these witnesses to testify to certain admissions or confessions alleged to have been made by the defendant, while he was in Federal custody, *which alleged confessions or admissions were not made in open Court.* Such statements, claimed to have been made by the accused while in custody, related, in large measure, to the overt acts charged in the indictment to have been committed by the defendant.

The Constitution expressly states that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open Court." We regard this provision as a prohibition against obtaining a conviction of the accused by any use of confessions obtained outside of open Court to show guilt of the defendant.

The trial Court erred not only in receiving such testimony but further erred in instructing the jury in Instruction No. 61 that such evidence "of certain alleged admissions made by defendant after he was in custody • • • may be considered by you solely on the issue of the intent or state of mind of the defendant in committing, if he did commit, any of the overt acts alleged in the indictment and submitted to your consideration in these instructions."

4. Testimony of Government witness Ernest Peter Burger and numerous Government Exhibits, consisting of explosive devices, etc., all of which was not connected up with the defendant, and all of which was expressly received in evidence for the sole and exclusive purpose of showing the enemy status of Herbert Haupt, were, nevertheless, considered and relied upon by the jury and by his Honor, Judge Evans, in said Circuit Court of Appeals opinion, to establish treasonable intent on the part of the defendant.

On page 32 of the opinion of Judge Evans, it is said:

> "One of the instructions Herbert received was to obtain a car to facilitate transportations of the explosives from the beach in Florida, for delivery to the various points of sabotage, and as a means of travel for the members of the expedition. The purchase of the car was arranged for within a couple of days of Herbert's return—showing urgency of his duty. The old Plymouth car had not become obsolete, in fact it

was used by the Haupt family during the week of surveillance. There would not have been the rush to buy the new car, without the pressing need for it."

A reading of Burger's testimony, which forms the basis for the above comment ,will disclose that Burger's recital of events and conversations occurring in Germany was objected to as hearsay evidence, and that time and again it was asserted by the Government that such testimony was offered merely for the purpose of proving the enemy status of Herbert Haupt, and that the testimony regarding the instructions given to Herbert Haupt and regarding other events in Germany were specifically restricted to that one point.

We, therefore, believe it was error for the Court to use this testimony for any different purpose, especially when such evidence was not competent for such other purpose. Also the other conclusions seems to be erroneous. There was no need for Herbert Haupt to acquire an automobile immediately upon his return because of "urgency of his duty". The saboteurs were not to begin operations, according to Burger, until at least three or four months after they had landed. And while it was true that the father's car, the old Plymouth, had not become obsolete, it should be remembered that the father used the car daily in his business as a painter, decorator and bricklayer.

It is perhaps the common experience of every father, who has a son or sons at home, that it is very hard for the father to have the use of the family car, as the son or sons seem to have constant and urgent need therefor in their social activities; and it seems that most fathers know that such constant and urgent need begins the very day when the son returns, as so many have done in recent

months. In the present case, it should be remembered that Herbert Haupt had owned a car, which he left behind and which the father had taken over and practically converted into a painter's truck.

Concerning the evidence of the Government's exhibits of explosive devices, etc., which were not admitted, nor admissible, as evidence against the defendant, Hans Haupt, the opinion of the Circuit Court of Appeals actually predicates its conclusion of guilt of the petitioner herein upon such evidence, *sic*, on page 43 of the opinion:

> "As against the defendant this evidence was receivable to show the treason to which Herbert was a party. It was necessary for the Government to show treason and *also* that defendant was a party to said treason. This evidence tended to show treason. The burden was on the Government to show (a) a treasonable enterprise and (b) defendant was a party to it. This evidence was part of the proof tending to establish (a). And the crime of treason is not child's play. It's a most serious matter. In all its naked wickedness, it is shocking. To offer evidence that the actors used high power explosives to destroy war industries, to kill large bodies of workers, to obtain war secrets of great value to the enemy, was no doubt highly impressive and persuasive with a jury of loyal American citizens. The complaint of counsel, however, should not be directed to the inadmissibility of such evidence. It should be directed to the action of defendant and his son. As against each of them such evidence would not have been harmful, had Hans and Herbert not been actors playing a leading role in the perpetration of said treason."

It is respectfully submitted that Herbert Haupt has never been charged with the crime of treason, nor tried therefor; nor had any high powered explosives been used

to destroy war industries, or to kill large bodies of workers (contrary to the assumptions made on page 43 of the Court's opinion). No act of sabotage was ever committed either by Herbert Haupt or by the defendant. It has been the theory of the defense in the case at bar, that Herbert Haupt abandoned his mission after he reached America, and counsel believe such to have been the fact. We are informed that such defense was made on behalf of certain of the saboteurs at the military trial and is now confirmed by information recently released to the press by the Depart of Justice.

The exhibits of explosive devices, admitted over defense objections, were not admissible against the defendant, and were not even connected up with Herbert Haupt. In fact, the exhibits and the entire testimony of Burger and of the FBI agents and experts was specifically restricted, when admitted in evidence, to show only the enemy status of Herbert Haupt and nothing else.

D.

The acts charged in the indictment were legally insufficient to constitute the crime of treason. The defendant's demurrer to the indictment should have been sustained.

Assuming full and sufficient proof (i. e., by two direct witnesses, etc.), for the purpose of this point, as to certain of the overt acts charged, it is clear that *neither the proof nor the allegation constitute, or could constitute, treason as declared by the Supreme Court in the Cramer case.*

We refer specifically to overt acts Nos. 10, 11, 13 and 15. Each of these overt acts merely charge the defendant with the act of "accompanying" Herbert Haupt, with only a variation as to the time and the destination stated.

Essentially, the same charge of *accompanying* (plus *conferring, treating and counselling with*) Werner Thiel, an enemy of the United States, was made in overt act No. 2 of the *Cramer case* as was made in our case in overt acts Nos. 10, 11, 13 and 15.

The *act* of Cramer in *accompanying* Thiel, as charged there in overt act No. 2, was fully proved in that case, viz.:

> "By direct testimony of two or more agents it was established that Cramer met Thiel and Kerling on the occasions and at the places charged and that they drank together and engaged long and earnestly in conversation. This is the sum of the overt acts as established by the testimony of two witnesses." *Cramer* v. *United States,* 65 S. Ct. 918, at page 936.

The Supreme Court reversed the *Cramer* conviction, making the following specific ruling:

> "We hold that overt acts 1 and 2 are insufficient as proved to support the judgment of conviction, which accordingly is reversed." *Cramer* v. *U. S.,* 65 S. Ct. 918, at p. 941.

Thus, as far as the charge of *accompanying* was concerned, such charge was fully proven in the *Cramer case,* but proof of such fact was held to be proof of an act legally insufficient to constitute treason.

A further comment, from the *Cramer case,* is also illuminating upon this point, viz.:

> "But if it showed him (*Cramer*) disposed to betray, and showed that he had opportunity to do so, it still has not proved in the manner required that he did any acts submitted to the jury as a basis for conviction which had the effect of betraying by giv-

ing aid and comfort. To take the intent for the deed would carry us back to constructive treasons." (*Cramer* v. *U. S.*, 65 S. Ct. 918, at page 937.)

Overt act No. 11, charging that the defendant, Hans Max Haupt,

> "*accompanied* the said Herbert Haupt to the home of Heinrich Koch, 7240 N. Odell Avenue, Chicago, Illinois, for the purpose of further assisting said enemy in procuring employment * * *"

and Overt Act No. 15, charging that the defendant

> "accompanied the said enemy Herbert Haupt to the Warner Motor Sales, 958 Diversey Parkway, Chicago, Illinois, to complete the arrangements for the purchase of an automobile for said enemy * * *"

are both in the same class. Moreover, we have definitely established that the Government failed to *prove* by two witnesses Overt Act No. 16, which involved the actual doing, or completion, of the thing for which it is charged in Overt Act No. 15 the defendant accompanied Herbert Haupt. Is Overt Act No. 15 (a most innocent act on the face of it) a legally sufficient overt act? All it charges is the act of accompanying. As noted, in the *Cramer case* it was held that such act is not a legally sufficient overt act of treason.

In fact, Overt Act No. 15, as well as the other overt acts, Nos. 10, 11 and 13; charging merely "accompanying", are not separate overt acts in their essence, but are merely parts of the particular overt acts which involve the ultimate purpose, and should not have been pleaded as separate overt acts. As separate overt acts, they are legally insufficient. If it were permitted to split one overt act into any number of parts, and then plead each one of such parts as separate overt acts, it would only be necessary

to ascribe a treasonable intention to each one of such overt acts, and there could never be a failure of proof of some selected part of the action pleaded as an overt act, namely such part or parts of the alleged charge which contained actions of a commonplace, everyday occurrence, such as the action of "accompanying". However, such ingenious method would not support a conviction, as is clearly indicated in the *Cramer case*:.

> "On the other hand, the Government's contention that it may prove by two witnesses an apparently commonplace and insignificant act and from other circumstances create an inference that the act was a step in treason and was done with treasonable intent really is a contention that the function of the overt act in a treason prosecution is almost zero. It is obvious that the function we ascribe to the overt act is significant chiefly because it measures the two-witness rule protection to the accused and its handicap to the prosecution. If the overt act or acts must go all the way to make out the complete treason, the defendant is protected at all points by the two-witness requirement. If the act may be an insignificant one, then the constitutional safeguards are shrunken so as to be applicable only at a point where they are least needed." *Cramer* v. *U. S.*, 65 S. Ct. 918, 934.

The opinion of the Circuit Court of Appeals herein, written by Judge Evans, concedes that the case must be reversed if any of the overt acts submitted to the jury were "either legally insufficient or not sufficiently established to present a jury question, by the direct testimony of two witnesses." (Opinion pages 7 and 45.) If said overt acts, or any of them, were, in fact, legally insufficient, as we maintain, then the Circuit Court of Appeals erred in failing to reverse the case.

The Government likewise made this same concession in its supplemental "*Memorandum of Authorities*" filed after oral argument, which, in view of the foregoing facts, amounts practically to a confession of error. (See Appeals Court Record, page 4.) Overt Acts Nos. 10, 11, 13 and 15 (merely charging "accompanying") are manifestly insufficient as a matter of pleading. In fact, they are but inconsequential parts of overt acts, pleaded, however, as complete overt acts in themselves.

E.

The trial Court improperly refused to receive in evidence the Statute of the State of Illinois relating to accessories after the fact, offered on behalf of the defendant.

It is generally considered to be against public policy to punish members of the immediate family of an offender as accessories after the fact, notwithstanding their knowledge of the fact that the offender has committed a crime. This public policy is declared or recognized in Illinois Revised Statutes, 1941, State Bar Association Edition, Chapter 38, Division II, Section 4, Paragraph 584. Several of the overt acts, Nos. 12, 17, 20, 21, 22 and 23, charged that the defendant harbored and sheltered Herbert Haupt in his home, and all of the alleged overt acts charge the defendant with intending to aid or assist Herbert. The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trial at common law, in the courts of the United States, in cases where they apply. The common law, as modified and changed by the Constitution and statutes of the State where the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent

with the laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, shall govern in the infliction of punishment on the party found guilty. See United States Code, Title 28, Sec. 725; R. S. Sec. 721, and United States Code, Title 28, Sec. 729; R. S. Sec. 722.

We contend that it was error for the trial Court to refuse to receive said Statute in evidence, and that it was error for the Circuit Court of Appeals to affirm this ruling of the trial court. (Opinion, page 48.)

F.

There was not sufficient evidence to submit the case to the jury, and the trial Court should have directed a verdict of "not guilty" as to each of the "submitted overt acts" (i.e., overt acts Nos. 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22 and 23).

We have already pointed out under Points A and C constitutional and technical insufficiency of the proof offered in support of said overt acts, as well as the incompetency of much of the proof offered by the Government upon which a verdict of guilty was secured from the jury. Reference is respectfully made, also, to Appellant's Brief in the Circuit Court of Appeals, pages 177 to 188, inclusive.

All of the overt acts which were submitted to the jury "as possible overt acts of treason" were of innocent nature, colorless and harmless in themselves. To obtain a conviction from the jury, it was necessary for the prosecution to ascribe a treasonable intent to all of said submitted acts, which traitorous intention was not manifest, however, from these colorless, insignificant and innocent

appearing acts themselves. The prosecution, however, accomplished the conviction of the defendant by the introduction of incompetent and highly prejudicial evidence. This matter has already been discussed under Point C *ante*, to which reference is here respectfully made.

G.

Petitioner was deprived of a fair and impartial trial by reason of improper, inflammatory and prejudicial argument to the jury by the Government's attorneys, appealing to passion, prejudice, patriotic emotions and war hysteria.

This matter would require considerable space, and we would like to refer this Honorable Court to Appellant's Brief in the Circuit Court of Appeals, pages 225 to 235, where the prejudicial argument is set out together with our authorities in support of this point.

H.

The trial Court committed reversible error in the giving of its charge and instructions to the jury, and in refusing to give proper instructions requested on behalf of the defendant.

1. Petitioner assigns error in the giving of the following numbered instructions in the Court's Charge to the Jury:

Instructions 9, 13, 26, 36, 39, 40, 41, 47, 49, 50, 51, 53, 54, 55, 56, 57, 58, 60 and 61. (Bill of Exceptions, 1794-1817.)

and in the refusal to give

Defendant's Requested Instructions: D-2, D-6, D-7, D-8, D-15, D-16, D-17, D-19, D-21, D-22, D-23, D-27, D-28, D-29 and D-30. (Bill of Exceptions, 1764-1791.)

A general verdict was returned by the jury in the case at bar finding the defendant "guilty as charged in the indictment." It was conceded, both in the opinion of the Circuit Court of Appeals and in the supplemental brief, entitled "Memorandum of Authorities", filed by the Government after oral argument in the Circuit Court of Appeals, that instructions Nos. 50 and 51 were, or would be, erroneous in connection with a general verdict, and the case would have to be reversed, "if the court submitted to the jury certain alleged overt acts which were charged in the indictment but which were either legally insufficient or not sufficiently established to present a jury question, by the direct testimony of two witnesses." (See Opinion, page 7.) Instructions Nos. 50 and 51, in substance, informed the jury that it was not necessary for the government to prove by two witnesses more than one of the submitted overt acts and that proof of *any one* of the submitted overt acts would warrant a conviction of the defendant. Elsewhere, we have shown that there was a manifest failure of proof on several of the submitted overt acts and that several of the submitted overt acts were manifestly insufficient as a matter of law under the ruling in the *Cramer case*. We believe that further argument would be superfluous to show the propriety of a reversal of the case upon this ground alone, without regard for the other serious errors which were committed in the trial of the case.

For convenience, we have set out in an appendix to this brief, certain of the instructions in the Court's Charge to the Jury, to which we objected and now assign error, together with our comments thereon. Likewise, in the appendix, are set out the defendant's requested instructions, which the Court refused to give, and our comments thereon.

2. The Court erred in sending into the jury room for the consideration of the jury a copy of the indictment, containing as it did a prejudicial and hurtful narrative, made up of many allegations of prejudicial matter irrelevant to the alleged overt acts of the defendant, and made up of many allegations concerning alleged overt acts upon which there was no evidence, or insufficient evidence, and which were withdrawn from the jury.

Said error of the Court in submitting the entire indictment to the jury was aggravated by the instructions contained in Paragraph 49 of the Charge to the Jury, wherein and whereby a belief by the jury of a treasonable intent of the defendant with respect to withdrawn overt acts—not even required to be founded upon evidence—was allowed to supply the treasonable intent for the submitted overt acts.

The defendant's counsel objected to the sending of the indictment to the jury room for their consideration, and called attention to the fact that the indictment contained a large number of overt acts which had been withdrawn, but the Court overruled the objection (Bill of Exceptions, 1273-1274).

Moreover, the indictment, in its preamble, contained a prejudicial and hurtful narrative regarding the alleged mission of Herbert Haupt, much of which was not supported by any evidence, but which had the necessary effect of prejudicing the defendant's right to a fair and impartial trial.

3. The Court erred in sending into the jury room for the consideration of the jury, the Court's Charge to the Jury, in typewritten form, thereby accentuating all the errors contained in the instructions in said Charge to the Jury, and

particularly the errors contained in Paragraphs 53, 54 and 63 of said Charge, which were inconsistent with and nullified the effect of the instruction in Paragraph 37 of said Charge to the jury.

If the instructions of the Court had been entirely free of error, we would have no complaint in regard to the sending of the same into the jury room. But as a result of the jury having said instructions before them during their deliberations, the pernicious effect of the erroneous instructions continued to operate against the defendant.

I.

Petitioner was deprived of a fair trial by reason of the constraint and exhaustion of the jury, resulting from 28 hours of continuous deliberation without sleep, and without accommodation for rest and sleep.

We contend that the compulsion resulting from the confinement of six men and six women jurors for approximately 28 hours in a jury room in the court house, without any accommodations for sleep or rest, operated to prejudice and did prejudice the right of the defendant to a fair and impartial trial. The jury, or some of them, obviously were in doubt as to whether or not the defendant should be found guilty upon the evidence submitted to their consideration. Previous to this continuous deliberation of 28 hours, the jury had sat through the proceedings of the last session of the court, so that the jurors were actually compelled to go without sleep for a period of 33 hours or more.

In the case of *Bollenbach* v. *U. S.*, opinion rendered in the U. S. Supreme Court on January 28, 1946, as case No.

41 of the October term of 1945, the jury were deadlocked for a period of 7 hours. Further instructions were given by the court to the jury which broke the deadlock and resulted in a verdict. This Honorable Court made the following comment on page 4 of its opinion:

> "An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming."

In the case at bar, the reading of the testimony of FBI Agents Hirsh and Robe to the jury after they were deadlocked for 24 hours and were unable to reach a verdict had an effect similar to the further instructions given by the court in the *Bollenbach case*. This testimony was incompetent and should not have been received in the first instance.

J.

The petitioner was deprived of a fair trial by the reading to the jury of the testimony of two Government witnesses (Hirsh and Robe) and one defense witness (Benedict Short), which was allowed over petitioner's objections twenty-four (24) hours after the submission of the case and the retirement of the jury to consider their verdict.

A most serious error was committed by the Trial Court after the conclusion of the trial and the submission of the case to the jury.

The case was submitted to the jury shortly before noon on June 8, 1944 (i. e., 11:22 A. M.). The jury deliberated

upon their verdict for approximately twenty-four hours without being permitted any accommodations for sleeping for resting, and without being able to agree upon any verdict. About five hours after the case had been submitted to the jury, counsel for the defendant asked the Court to reconsider certain instructions in the Court's Charge to the Jury, namely, Nos. 53 and 54, and the objections which counsel had made thereto, and requested a modification or elimination of said instructions.

In this connection, the Court remarked:

> "It would just confuse the jury by sending in another instruction and emphasize something all out of proportion. No matter how much we tell them about the instruction, or what has been said, they could never refrain from over-emphasizizng what we would now send to them" (Bill of Exceptions, 1607).

The request of defense counsel was refused.

The following day, while the jury was still deliberating and unable to reach a verdict, the foreman sent a request in writing to his Honor, Judge Barnes, "that the testimony of Messrs. Short, Hirsh and Robe be read to them at this time."

A conference was had in chambers between the Court and counsel for both sides. The defendant's counsel objected to the reading of such testimony to the jury. The United States Attorney was doubtful, and thought it would be dangerous to do so over defense objection. Counsel for defendant particularly pointed out the connection between the testimony of Government witnesses Hirsh and Robe, and the objectionable matter contained in instructions Nos. 53 and 54 which practically cancelled out the correct instruction No. 37. We also called the Court's attention

to our original objections to the competency of the original testimony of these witnesses (Bill of Exceptions, 1613); and to the fact that the jury had then been deliberating, without sleep, uninterruptedly for twenty-four hours, with the exception of time spent for luncheon, dinner and breakfast (Bill of Exceptions, 1617). The Court overruled the objections of the defendant, and directed counsel to read the testimony of their respective witnesses. Counsel for the defendant informed the Court that he would rather not take part in the reading of the testimony, but the Court directed that he should read the testimony of the defense witness, Mr. Short, without any waiver of defense objections (Bill of Exceptions, 1614). The jury were recalled to the courtroom, and, in the presence of the defendant, the testimony of the two Government agents, Hirsh and Robe, and of the defense witness, Mr. Short, was read to the jury, after which the jury retired and arrived at a verdict of guilty, approximately twenty-eight hours after the case had been submitted to them. Including the morning of the day of the submission of the case to the jury, the various members of the jury (six men and six women) must have been without sleep for a matter of approximately thirty-three hours. We believe that the Court should have either discharged the jury after a reasonable time of deliberation, or should have permitted the jury accommodation for sleep at some hotel.

We believe that the defendant was greatly prejudiced by the irregularity of the reading of the testimony of the two Government witnesses, which in combination with the erroneous instructions of the Court, tended greatly to deprive the defendant of that fair and impartial trial in conformity with law that he was entitled to have. The jury were allowed to hear a second time a small portion

of the proceedings of a long trial, embracing the testimony of two witnesses for the prosecution and only one witness for the defense, without having the benefit of hearing again the testimony of all of the other witnesses, on direct examination and upon cross examination, and without hearing the remainder of the evidence on behalf of the defendant. Likewise, there was no repetition of the arguments of counsel for the defendant. The aforementioned remark that the Court made with respect to sending an instruction to the jury after their retirement applied with even greater force to the reading of such testimony to the jury. It emphasized such testimony all out of proportion. No matter what the Court might tell them in instructions with respect thereto, the jury could never refrain from over-emphasizing the testimony of such witnesses. The error committed by the Court in originally admitting the testimony of the Government agents concerning alleged admissions of the defendant not made in open court, became doubly harmful and grievously prejudicial.

K.

The verdict of the jury was the result of passion, prejudice, war hysteria and misapprehension of law and fact induced by the errors committed in the trial of the case.

Numerous prejudicial errors were committed in the trial of the case in receiving improper and prejudicial evidence and in giving to the jury erroneous instructions. The verdict was further induced by improper, highly inflammatory and prejudicial argument made by the Government's attorneys, appealing to the passion, prejudice and patriotic emotions of the jury. The verdict was further induced by the reading to the jury of the testimony of two Gov-

ernment witnesses (Hirsh and Robe) and of one defense witness (Benedict Short), which was done over petitioner's objections, twenty-four hours after the submission of the case and the retirement of the jury to consider their verdict. The constraint of the jury resulting from twenty-eight hours of continuous deliberation without sleep and without accommodation for rest and sleep further operated to produce a verdict against the defendant. The jury were deadlocked for twenty-eight hours and yet they were not permitted by the Trial Judge to have hotel accommodations, or any other opportunity for rest or sleep, the six men and six women jurors being confined in a jury room in the Court House under conditions which necessarily produced a state of exhaustion to the prejudice of the interest of the defendant. These errors, all of which operated to deprive the defendant of a fair and impartial trial and due deliberation by the jury have already been discussed under our previous points in this brief. These various errors were accentuated by the fact that the trial occurred during wartime and the arguments to the jury by the Government's Attorneys commenced on the very day when the news broke of the invasion of France by American and allied military forces, and what has become known as "D-Day", or "Invasion Day". This dramatic event came at the climax of the trial and undoubtedly had its affect upon the emotions of the jurors.

I.

The verdict in this case was a general one of "guilty as charged in the indictment", without special findings as to the acts or acts on which it rests. Since it is not possible to identify the grounds on which the defendant was convicted, the verdict must be set aside if ANY of the

separable acts submitted was legally insufficient or was insufficiently proved by two witnesses as required by the Constitution. (See Cramer case.) There was a failure of proof, not only upon the overt acts "withdrawn from the jury", but also upon overt acts "submitted to the jury as possible acts of treason." There were, also, submitted overt acts, which were legally insufficient.

Not only was there a failure of proof upon the overt acts "withdrawn from the jury", but there was also a failure of proof upon overt acts "submitted to the jury as possible acts of treason." This failure, we believe, was conclusively shown in the dissenting opinion of his Honor, Judge Major, in the Circuit Court of Appeals. We have also endeavored to demonstrate this fact under our Point A. The legal insufficiency of submitted overt acts has been dealt with under our Point D, to which we respectfully refer.

As conceded in the opinion of the Circuit Court of Appeals herein and by the Government in their supplemental memorandum of authorities, the conviction of the defendant should be reversed if the Court submitted to the jury any alleged overt act which was either legally insufficient or not sufficiently established to present a jury question by the direct testimony of two witnesses.

A sentence cannot rest upon a general verdict of guilty, where the indictment charges several alleged overt acts and where any one of the overt acts submitted to the jury was insufficient. (*Cramer* v. *United States*, 65 S. Ct. 918, 935 footnote 45.)

The jury were instructed in instructions Nos. 50 and 51 that proof of any *one* of the submitted overt acts would be sufficient for the jury to find the defendant guilty.

It follows that these two instructions constitute error, under a general verdict, in view of footnote 45 of the *Cramer case*, if any one of the submitted overt acts was legally insufficient. A like result may prevail, if any one of the submitted overt acts was not proved as required. The Government and the Circuit Court of Appeals conceded both of these propositions.

CONCLUSION.

The trial Court imposed a sentence of life imprisonment and a fine of $10,000.00 upon the petitioner. Numerous errors were committed in the trial of this case, many of which we have not even noticed by reason of the limitations of time and space. However, we believe that we have shown many serious errors, for which the judgment and sentence should be reversed. We believe that every consideration of justice and fairness requires a reversal herein.

We respectfully pray that the petition for writ of certiorari may be granted and the judgment herein and the sentence of the petitioner, Hans Max Haupt, may be reversed and set aside by order of this Honorable Court.

Respectfully submitted,

HANS MAX HAUPT,
Petitioner, *pro se.*

PAUL A. F. WARNHOLTZ,
FREDERICK J. BERTRAM,
Of Counsel for Petitioner.

APPENDIX.

(a) In re: Instructions Given to Jury.

The following instructions given in the Court's Charge to the Jury were objected to, to the giving of which error is assigned by the petitioner herein:

INSTRUCTION No. 26.

"26. The indictment charges that the adherence of the defendant, Hans Max Haupt, to the German Reich, its counselors, armies, navies, agents, representatives and subjects, and said giving of aid and comfort by him consisted * * * in his giving false information regarding and concealing the identity of Herbert Haupt, as a representative of the German Reich and the mission of Herbert Haupt in the United States; in his receiving, holding, possessing, safeguarding and concealing the property and funds of said Herbert Haupt, and in misrepresenting and concealing the ownership of said property and funds and in his maintaining, harboring, feeding and supporting said Herbert Haupt throughout said period of time."

Objections were made by defendant's counsel to the recital of the charges of the indictment in the Court's Charge to the Jury, upon the ground that the recital of such charges by the Court, as done in said Charge would create an unfavorable impression in the minds of the jury and would prejudice the rights of the defendant. (Bill of Exceptions, 1221.)

Specific objection was made to paragraph 26 of the Court's Charge, wherein the Court repeated the charges above set out, which charges related to overt acts *with-*

drawn and to matters upon which no evidence was submitted. (Bill of Exceptions, 1224-1227.)

We believe it was substantial error for the Court in its Charge to tell the jury that the defendant was charged with committing offenses related in overt acts which were withdrawn, especially when the Court later told the jury that they might consider such withdrawn overt acts in determining the question of the treasonable intent of the defendant (proof of which withdrawn overt acts was not required). Reference is here made to Instruction No. 49, as it bears upon No. 26 above mentioned.

INSTRUCTION No. 36.

"36. Applying these general principles to this case, if you find from the evidence beyond a reasonable doubt that during the period from June 17, 1942, to and including July 17, 1942, Herbert Haupt was an agent of the government of the German Reich, or an enemy saboteur, and that he was engaged with or working for the government of the German Reich to assist that government in the prosecution of its war against the United States, or to hamper the United States in the prosecution of its war against Germany, and that the defendant knew that Herbert Haupt was an enemy agent or saboteur as aforesaid, and with such knowledge adhered to said Herbert Haupt as an enemy agent and with treasonable intent, as hereinbefore defined, gave him aid and comfort as such enemy as alleged in the indictment, then you may find that such defendant intended to adhere to the enemies of the United States and give aid and comfort to them."

This instruction in effect directs a verdict against the defendant without requiring proof by "the testimony of two witnesses to the same overt act" as required by the Constitution. We contend that it was reversible error

for the Court to omit this essential requirement in its specific statement to the jury of what must be proved in order to find the defendant guilty of treason. The instruction permits the jury to make such finding *without requiring the proof of even a single overt act.* Reference is made to the indictment generally, but this reference does not require proof of any overt acts. The instruction is restricted only to a *belief* of the jury beyond a reasonable doubt that the defendant gave aid and comfort to Herbert Haupt, with knowledge that he was an enemy agent. The intent to adhere to Herbert is declared to be sufficient evidence that the defendant intended to adhere to the enemies of the United States.

This ignores the issue of the real intent of the defendant, and it ignores, particularly, the defense theory predicated upon the father and son relationship, and the fact that a father might do an act to comfort his son, particularly a natural act, such as giving shelter to an offspring, without any intention to commit treason, and without any intention to do harm to the United States.

The omission of the overt act and the two-witness rule from this instruction make it erroneous, and, we believe the error is of such magnitude as to require a reversal of the case.

We may also add, that in this instruction, and also in instructions numbered 33, 34, 35 and 50, reference is made to "treasonable intent, as hereinbefore defined". However, "treasonable intent" was not defined "hereinbefore", nor anywhere in the Court's Charge and instructions to the jury.

INSTRUCTION No. 41.

"41. An overt act in itself may be a perfectly innocent act, standing by itself; but it must be in some manner in furtherance of the crime."

Objection was made to this instruction as being misleading and confusing to the jury. The United States Attorney expressed doubt concerning the particular language used, and suggested changing the words "perfectly innocent act" to read "perfectly innocent appearing act," which suggestion was concurred in by defense counsel, but the Court refused to modify the language to insert the word "appearing". (Bill of Exceptions, 1240-1242.) We believe that our objection is sound. If an act of the defendant is in fact perfectly innocent, nothing can make it either treasonable or criminal. The fact that an innocent act happens to further the accomplishment of a crime, certainly does not make the innocent doer of the act either a criminal or a traitor. The suggested modification might have clarified the language somewhat, but the Court refused to accept the suggestion. If the jury could receive the impression, and we think they definitely could, that the defendant might be guilty of treason, even though the overt act in question was perfectly innocent, then this instruction deprived the defendant of a fair trial and is reversible error. We now contend such to be the fact.

INSTRUCTION No. 49.

"49. Since the law requires that there shall be no conviction of treason unless there are two direct witnesses to the same overt act, all the other alleged overt acts charged in this indictment are hereby withdrawn from your consideration as overt acts of treason, for even if you believe beyond a reasonable doubt they were performed, they may not in themselves be

made the basis of a conviction under the Constitution. However, if you believe beyond a reasonable doubt that the defendant did actually perform any of these other alleged overt acts which were not proven to the degree required by the Constitution, you may consider any such act in determining the question of the intent with which the defendant may have performed, if you find beyond a reasonable doubt he did perform any of the above alleged overt acts submitted to your consideration and not withdrawn, and which other possible overt acts, not withdrawn, you find from all of the evidence are proven beyond a reasonable doubt by two direct witnesses to the same overt act."

We believe this instruction constitutes reversible error in view of the recent decision in the *Cramer case.*

The instruction informs the jury that they may consider overt acts which were "withdrawn from your consideration as overt acts of treason * * * in determining the question of the intent with which the defendant may have performed, if you find beyond a reasonable doubt he did perform any of the above alleged overt acts submitted to your consideration and not withdrawn," etc. In this connection, it will be noted that the jury is permitted to consider the "withdrawn overt acts" upon the question of intent *without any requirement that such withdrawn overt acts need to be established by any degree of proof whatsoever.*

The Supreme Court, in reversing the *Cramer case,* said:

> "We cannot sustain a conviction for the acts submitted on the theory that, even if insufficient, some unsubmitted ones may be resorted to as proof of treason. Evidence of the money transaction serves only to show how much went out of the case when it was withdrawn." *Cramer* v. *United States,* 65 S. Ct. 918, 937.

The testimony of the Government witnesses Hirsh, Robe, Majerczak, Hamby, Miss Demmler, Zermer and Eggert, all concerned, either entirely or in large measure, unsubmitted overt acts which were withdrawn from the jury as possible overt acts because of insufficiency of the proof with respect to such withdrawn acts. There can be no doubt but that this incompetent evidence and this erroneous instruction to the jury, constituted a major factor in producing a conviction of the defendant. Under the authority of the *Cramer case* and the definite ruling of our Supreme Court upon this point, the conviction in this case, we believe, should be reversed.

INSTRUCTION No. 50.

"50. If you believe from the evidence beyond a reasonable doubt that Herbert Haupt, as alleged in the indictment, was an enemy agent, spy or saboteur and that he came into the United States on a mission for the German Reich and was acting as such agent, spy or saboteur on such mission while here, and that the defendant, Hans Max Haupt, knowing that he was such agent, spy or saboteur, unlawfully, feloniously, maliciously, intentionally, traitorously and treasonably and with treasonable intent as hereinbefore defined did adhere to and give aid and comfort to the said Herbert Haupt as an enemy, all as alleged in the indictment, and that in furtherance of or in carrying out said alleged adherence and giving of aid and comfort, Hans Max Haupt with treasonable intent performed any one of the above alleged overt acts submitted to your consideration and that two direct witnesses have testified to such act, then you may find the defendant guilty. Otherwise you must find the defendant not guilty."

This instruction directs the jury to find a verdict of guilty if they believe that the defendant, with treasonable intent, performed *any one* of the submitted overt acts, and that two direct witnesses have testified to such act. This instruction permitting a verdict of guilty if the jury believe any single act of the submitted acts was proved, is absolutely erroneous if this Honorable Court determines that any of the submitted overt acts, as pleaded or as proved, were legally insufficient to support a conviction for treason as a general verdict was rendered.

INSTRUCTION No. 51.

"51. It is not necessary for the government to prove by two witnesses the performance of more than one of the submitted overt acts, providing, of course, the other elements of the alleged crime are proven beyond a reasonable doubt as heretofore defined in these instructions."

The same objection applies to this instruction as to No. 50, with respect to the insufficiency of certain of the submitted acts, as proved and as pleaded. It repeats and emphasizes the error of the trial court in permitting the jury to base a general verdict of guilty upon a submitted overt act which was either insufficiently proved or insufficiently pleaded, or which could not under the constitutional definition be considered an overt act of treason.

INSTRUCTIONS Nos. 53 AND 54.

"53. As I have heretofore stated to you the treasonable intent of the defendant is an essential element of the crime charged herein, and before you can find the defendant guilty you must find beyond a reasonable doubt, not only that such defendant adhered to the enemies of the United States, giving them aid and

comfort, but also that at the time of such alleged adherence and giving of aid and comfort, the defendant intended to do so. This does not mean, however, that you must find that the defendant went through any specific mental process as a result of which he was conscious of the specific thought, 'I am going to commit treason'. This is not necessary for every man in law is presumed to intend the natural and probable consequences of his acts if they are deliberately done. Anyone who is conscious of his acts and his surroundings and knowingly commits certain acts must be regarded as intending the natural and probable consequences of those acts. These observations are, of course, not intended to cast any inferences one way or another on the defendant's intent."

"54. In this regard, motive should not be confused with intent. If a person knowingly and deliberately adheres to and gives aid and comfort to one whom he knows to be an enemy, then he must, in law, be taken to intend the natural and probable consequences of his own deliberate act, and the fact that his motive may not have been to aid the enemy is no defense. In other words, one cannot do an act which he knows will give aid and comfort to a person he knows to be an enemy of the United States and then seek to disclaim criminal and treasonable intent by saying that his motive was not to aid the enemy. So if you believe from the evidence beyond a reasonable doubt that the defendant as alleged in the indictment, performed one or more of the overt acts submitted to your consideration and that that act or those acts were of such a nature that the natural and probable consequence of their performance was to give aid and comfort to the enemy, and if you further believe that the defendant performed such act or acts deliberately with knowledge that Herbert Haupt was an enemy agent, if you find that he was, then you may find that the defendant had the criminal and treasonable intent, since he intended to do the act forbidden by the

law. Under such circumstances, the fact that you may also believe that his motive in so doing, if you find that he did, was for example, to help his son, would not in such event, change the fact that he had a criminal and treasonable intent."

These instructions were strenuously objected to by counsel for the defendant in the conferences with the trial judge. These instructions were suggested by the Government's attorneys and were adopted by the Court practically verbatim.

We objected to the phrase in instruction No. 53, "before you can find the defendant guilty" on the ground that the same indicates an anticipation on the part of the Court that the jury would find the defendant guilty. We also objected to the statement in this instruction which reads: "This does not mean, however, that you must find that the defendant went through any specific mental process as a result of which he was conscious of the specific thought 'I am going to commit treason'. This is not necessary, for every man in law is presumed to intend the natural and probable consequences of his act if they are deliberately done."

We contend that this statement of law is incorrect and erroneous when it is applied to the crime of treason, because in a trial for treason, the specific intent to commit treason is an essential element to be found by the jury. This instruction we believe is particularly vicious in that it misleads the jury and informs them that the intent of the defendant will be presumed as a matter of law if the particular act was consciously and voluntarily done. We maintain that there is a distinction between an intention to do a particular act, and an intention to commit treason. A man may do an act intentionally, and yet not intend

to commit treason. If he does not intend to commit treason, it does not make him guilty of treason because such act actually gave aid and comfort to the enemy. An example of this would be the acts of countless of our citizens during the present war going upon a strike, or doing some other act which obviously interfered with our war effort, and thereby gave aid to the enemy. We do not believe that it can be maintained that such citizens who deliberately went upon a strike, or did some other act, the natural and probable consequence of which aided the enemy, could be tried and convicted of treason under the Constitution of the United States. The reason such persons could not be convicted of treason would be because they did not have the specific intent to commit treason against our country when they did the act in question, and yet every such person, under the express language of this instruction, could be convicted of the crime of treason. We insist that to tell the jury that it was not necessary that the defendant should have been conscious of the specific thought, "I am going to commit treason", was reversible error. That thought is the very thing that the Constitution and laws of the United States require must be present in order to convict a citizen of treason.

The Supreme Court makes this clear in the *Cramer case*, 65 S. Ct. 918, at page 933:

> "Of course the overt acts of aid and comfort must be intentional as distinguished from merely negligent or undesigned ones. Intent in that limited sense is not in issue here. But to make treason the defendant **not only must intend the act, but he must intend to betry his country by means of the act.**" (Emphasis supplied.)

This instruction made it possible for the prosecution to avoid the very safeguard which our Constitution intended to establish for the protection of our citizens in a trial for this high crime.

We contend that Instructions 53 and 54 together build up in logical sequence a situation where the jury would be left with nothing to decide if they found that the defendant had performed any single one of the commonplace and insignificant acts which are charged in the indictment as overt acts of treason, namely, sheltering Herbert, or accompanying him to a home or to a place of business, or merely signing a financial statement or a purchase order for an automobile.

Instruction No. 54, in our opinion, commits grievous error. It is wholly erroneous in conception and grievously prejudicial to the right of the defendant to a fair and impartial trial by a jury properly instructed upon the law.

In this instruction, a distinction is attempted to be drawn between *motive* and *intent*, where none exists in law or in fact. The fact that the defendant's motive may not have been to aid the enemy is declared to be *no defense*.

This is fallacious quibbling. There is no basis under the Constitution for rejecting the motive with which an act is done. It is not true that the fact that the defendant's motive was not to aid the enemy could be no defense. There must be adherence and adherence must be the motive or motivating force.

"Motive" is defined as:

> "That which incites to action, prompts or excites to choice, or moves the will." (Webster's Collegiate Dictionary.)

To tell the jury that the defendant's motive was not of any consequence and that he could be guilty of treason, though his motive was not to aid the enemy, was utterly to confuse the jury, and to nullify the protection of the Constitutional provision.

In the *Cramer case,* 65 S. Ct. 918, at page 932, the Court said:

> "On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason."

The instruction further departs from the Constitutional definition in emphasizing the adherence and aid to *one person,* which distorts or detracts from the requirement of an intention to aid the *enemies* of the United States.

The instruction unqualifiedly states, "if the person knowingly and deliberately adheres to and gives aid and comfort to one whom he knows to be an enemy, then he must, in law, be taken to intend the natural and probable consequences of his own deliberate act, and the fact that his motive may not have been to aid the enemy is no defense."

This statement violates the Constitution and every authoritative statement of the law of treason that we have read. The very nature of treason, and the constitutional requirement that there must be an adherence to the *enemies* of the United States, is ignored in this instruction. If the motive of the accused is not to aid the enemy, (in this case, the German Reich), there can be no treason.

Further on in this instruction, the jury are informed that if they believe that the natural and probable consequence of a "submitted overt act" was to give aid and comfort to the enemy, and that the defendant performed such act "with knowledge that Herbert Haupt was an enemy agent, if you find that he was, then you may find the defendant had the criminal and treasonable intent since he intended to do the act forbidden by law."

This statement entirely eliminates the requirement of adherence to the enemy. An accused person may commit treason and not know it, under this instruction. If the sole test is whether or not the natural and probable consequence of an act was to give aid and comfort to the enemy, then indeed, the words of Justice Livingston in *United States* v. *Hoxie*, 26 Fed. cases 15,407, at page 399, would aptly describe the situation that would result:

> "Once disregard these exceptions, and render the constitutional rule as flexible or comprehensive as it is now suggested to be, and prosecutions for treason will become as common as indictments for petit larcenies, assaults and batteries, or other misdemeanors. If every opposition to law be treason, for very like this is the language we have heard, as all offences partake in some measure of that quality, who can say how many of them will in time become ranged under the class of treason. Neither you, nor the court, can feel any ambition of leading the way, in setting a precedent so dangerous, or one that will in any degree tend to demolish that barrier which has been raised by the Constitution against constructive treasons."

Under this instruction, every person who participated in a strike during war time, could be prosecuted and convicted of treason. Though such actions may be reprehensible, they do not amount to treason under American law.

The question of intent in a treason case is not the same as the question of intent in most criminal cases, as for example, burglary or robbery with a gun. This is pointed out in the *Cramer case*, 65 S. Ct. 918, at page 933, as follows:

> "Questions of intent in a treason case are even more complicated than in most criminal cases because of the peculiarity of the two different elements which together make the offense. Of course the overt acts of aid and comfort must be intentional as distinguished from merely negligent or undesigned ones. Intent in that limited sense is not in issue here. But to make treason, the defendant not only must intend the act, but he must intend to betray his country by means of the act. It is here that Cramer defends."

It will be noted, also, that the instruction directly conflicts with and nullifies instruction No. 37 in the Court's Charge, given with respect to the defense theory upon the father and son relati nship, and which reads as follows:

INSTRUCTION No. 37.

> "37. If you are not satisfied, beyond a reasonable doubt, that the defendant's intention and purpose in acting as he did was evil, that is, if you are not satisfied beyond a reasonable doubt that the defendant intended to aid and comfort the enemies of the United States, the defendant must be found not guilty. If you believe the defendant's intention in doing what he did during the period from June 17, 1942, to and including July 17, 1942, was not in any way to injure the United States but merely to assist his son, Herbert Haupt, as an individual, as distinguished from assisting him in his purposes, if such existed, of aiding the German Reich, or of injuring the United States, the defendant must be found not guilty."

Now, instruction No. 37 is certainly based upon the premises that Hans Haupt knew his son to be an enemy agent. If that were not so, what reason could there be for giving this instruction at all? If that were not so, Hans Haupt would be in the same position as any streetcar conductor, who accepts a fare from an enemy agent and permits him to ride on his streetcar, however, not knowing him to be an enemy agent. And who would deem it less than absurd, to claim that such motorman had been guilty of treason by reason of such act?

Certainly, instruction No. 37 presupposes knowledge by Hans Haupt of Herbert's enemy status. And it correctly points out the difference, as it affects the law of treason, between an act by a father to assist his son as an individual, as distinguished from assisting him in his purposes, if such existed, of aiding the German Reich, or of injuring the United States.

And now, by instruction No. 53 the jury are told that a specific intent to commit treason is unnecessary for the commission of the crime of treason, and by instruction No. 54 the jury are told, that the intent, as it was properly called in instruction No. 37, does not exist anymore, except as a legal conclusion. The "intention" with which the father may have acted under instruction No. 37, has disappeared, and the word "motive" has taken its place. And the act of a father assisting, as an innocent act, has also disappeared, and whatever act a father may have committed, in the nature of assisting his son, by virtue of instructions Nos. 53 and 54 must necessarily become one of aiding the enemies of the United States, namely the German Reich.

At the end of instruction No. 54, the jury are told that even though the jury may believe that the defendant's *motive* was to help an individual, namely, his son, it would not in such event "change the fact that the defendant had a criminal and treasonable intent."

The fact that the instructions (Numbers 37, 53 and 54) are contradictory, or conflicting, is itself ground for reversal because of the confusion of the jury necessarily caused by such conflict.

INSTRUCTIONS NOS. 55 AND 56.

"55. While it is necessary that the government prove treasonable intent beyond a reasonable doubt, it is not necessary to warrant a conviction under the Constitution, that this intent be so established by the testimony of two witnesses; neither is it necessary that this intent be so proven by direct evidence, as such intent may be so proven either by direct or circumstantial evidence. Intent, being a mental state may not be susceptible of being proved by direct evidence, and, therefore, you may infer the nature of the defendant's intent from all the circumstances."

"56. Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts and circumstances, which have a legitimate tendency to lead the mind to the conclusion that the fact exists, which is sought to be established."

These instructions state a rule of law contrary to the rules laid down in the *Cramer case*, 65 S. Ct. 918, at pages 934, 935 and 937 and constitute error.

INSTRUCTIONS NOS. 57 AND 58.

"57.. The defendant's own conduct and words, if any, may be an index as to his intent and you may infer from the defendant's conduct, and words, if any are shown by the evidence, what his intent might have been."

"58. There has been some testimony of certain statements purportedly made by the defendant prior to our declaration of war with Germany. Such statements of the defendant, if you believe they were made, are not grounds for charging the defendant with treason. The defendant, as well as others, had the right to his opinions and to do anything lawful in keeping with those opinions and sympathies, but those statements, if you believe any were made, may be borne in mind by you in determining what his intent may have been after this country was at war with Germany, in committing, if you find beyond a reasonable doubt that he did so commit, any of the various overt acts charged in the indictment and submitted to your consideration by the court in these instructions."

These instructions plainly tell the jury that the words and conduct of the defendant prior to the war may be considered by the jury in determining what the defendant's intent was, after this country was at war with Germany, in committing (if he did) any of the overt acts charged in the indictment and submitted to the jury.

Upon the authority of the *Cramer Case,* 65 S. Ct. 918, these instructions contained an erroneous statement of law.

In the *Cramer case,* 65 S. Ct. 918, at Page 939, the Court said that with respect to evidence of this character:

"Other evidence relates statements by Cramer before the United States was at war with Germany. At the time they were uttered, however, they were not trea-

sonable. To use pre-war expressions of opposition to entering a war to convict of treason during the war is a dangerous procedure at best. The same may be said about the inference of disloyal attitude created by showing that he refused to buy bonds and closed the door in the salesman's face."

Each statement referred to in Instruction No. 58 was testified to by only one witness. Therefore, the instruction also violates the two-witness rule.

INSTRUCTION No. 60.

"60. The Court has permitted the Government to introduce into evidence in this case certain alleged statements or utterances purportedly made by the defendant prior to the events forming the basis of the indictment in this case. Such statements or utterances, if you believe they were made by the defendants, do not constitute evidence of the commission either of the treason alleged or of the commission of any alleged overt act, but may be considered by you, if you credit them, solely in determining the intent or state of mind of the defendant in performing, if you find he did perform, any alleged overt act or acts of treason charged in the indictment to have been committed by him, and submitted to your consideration in these instructions."

This instruction relates to statements (each testified to by only one witness) made by the defendant prior to the time of the overt acts charged in the indictment, and embraces the pre-war expressions of the defendant. The contentions which we made with respect to Instruction No. 58 likewise apply to this instruction. We contend that under the decision in the *Cramer case*, the testimony of witnesses concerning utterances made by the defendant,

which were entirely unrelated to the overt acts, is incompetent and inadmissible, and that any instruction permitting the jury to consider such testimony would constitute reversible error. The instruction also violates the two-witness rule.

INSTRUCTION No. 61.

"61. The court has also permitted the Government to introduce evidence of certain alleged admissions made by defendant after he was in custody. You are instructed that such evidence may be considered by you solely on the issue of the intent or state of mind of the defendant in committing, if he did commit, any of the overt acts alleged in the indictment and submitted to your consideration in these instructions. In other words, any witness who may have testified to such alleged admissions is not a 'witness' within the meaning of the Constitutional requirement of 'two witnesses to the same overt act.'"

The evidence of alleged admissions referred to in this instruction relates to the testimony of Government Agents Hirsh and Robe and of the convicts, Majerczak and Hamby.

The instruction permits the jury to consider such alleged admissions of the defendant as evidence upon the issue of the treasonable intent of the defendant. It is clear that the testimony of said witnesses relates to confessions of the defendant not made in open Court, but claimed to have been made by him in conversation with the witnesses while he was in custody.

We maintain that the Constitution prohibits the use of a confession in any manner to obtain a conviction for treason, unless such confessions is made in open Court. If the prohibition of the Constitution meant anything less than that, it would be practically valueless as a protection of

the rights of the accused. To let the bars down to permit treasonable intent to be so proved, would place the accused at the mercy of any person (even of convicted criminals, as here). For the same reason, an instruction permitting the jury to consider for any purpose testimony regarding alleged confessions, which were not made in open Court, would be highly improper and erroneous, following the ruling in the *Cramer case*.

If our contention is correct that the Constitution prohibits the use of confessions to obtain a conviction, unless made in open Court, then the giving of instruction No. 61 was reversible error. The words "No person shall be convicted of treason unless—" impliedly prohibit the use of confessions to obtain a conviction unless they are made in open Court.

(b) The Court erred in refusing to give to the jury certain instructions requested on behalf of the defendant.

The defense counsel submitted to the Court thirty instructions in writing, numbered D-1 to D-30, inclusive, and requested that the same be given to the jury by the Court. The Court, however, failed and refused to give to the jury certain of the instructions requested by the defendant, and considered that others of said requested instructions were sufficiently covered in the Court's Charge to the Jury. We shall refer only to those instructions requested on behalf of the defendant which we believe were erroneously refused and were not correctly or sufficiently covered in the Court's Charge to the jury.

REFUSED INSTRUCTION D-2.

An overt act must not only be proved beyond a reasonable doubt by two witnesses who saw the commission of that overt act, but it must also be proved, that

such overt act was committed with an intent to commit treason.

Such overt act must be one of the overt acts enumerated as such in the indictment.

This instruction contained a clear, correct and concise statement of law, and should have been given to the jury. The Court did not in its Charge to the Jury correctly instruct the jury with respect to the required proof of the overt act and treasonable intent, and we; therefore, submit it was error to refuse this instruction.

REFUSED INSTRUCTION D-6.

The Court instructs the Jury that at the times mentioned in the indictment in this case, to wit, during the period from June 17, 1942, to July 17, 1942, there was, and still is, in full force and effect a certain Statute of the State of Illinois, which reads as follows:

"Every person not standing in the relation of husband or wife, parent or child, brother or sister to the offender, who knows the fact that a crime has been committed, and conceals it from the magistrate, or who harbors, conceals, maintains or assists any principal felon, or any accessory before the fact, knowing him to be such, shall be deemed an accessory after the fact, and shall be punished by imprisonment in the penitentiary for a term of not less than one year and not exceeding two years, and fined not exceeding $500.00."

REFUSED INSTRUCTION D-23.

The Court instructs the Jury that under the laws of the State of Illinois a parent cannot be prosecuted as an accessory after the fact for harboring, concealing, maintaining or assisting a son who has committed a crime, even though the parent has knowledge of the commission of the crime after the fact.

These instructions inform the jury of the Illinois Statute, which was in force and effect at the time of the alleged commission of the overt acts charged in the indictment.

The Illinois Statute was pertinent and material to a consideration of the charges of harboring and sheltering Herbert Haupt, who was the defendant's son. This Statute established a rule of public policy in the State of Illinois against the prosecution of parents, or members of the immediate family, as *accessories after the fact,* for harboring, etc., an offender. There is no similar Federal Statute, but there are Federal Statutes (Sections 725 and 729 of Title 28, U.S.C.) which provide that State Statutes, so far as they may be applicable and not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the Federal Courts in the trial and disposition of cases and in the infliction of punishment, etc.

We see no inconsistency between such a law, or public policy, and the Federal Constitution and law on treason. The apparent inconsistency springs from the fact that a natural, normal, commonplace act of giving shelter to the defendant's own son has been selected by the prosecution as an overt act of treason. If something beyond giving shelter or harboring his son was committed by the defendant, then this Statute, which relates only to *accessories after the fact,* likewise would not apply, for if a parent assisted his son in the commission of a crime, he would be subject to prosecution under the State law just as much as he would be under a Federal law.

REFUSED INSTRUCTION D-7.

The Court instructs the Jury that the witnesses, John Majerczak, alias Stanley Norris, and Carl Hamby,

are persons who have each been convicted of several felonious crimes.

The Court further instructs the Jury that the testimony of a witness who has been convicted of a felony is to be considered by the Jury with extreme caution and with due regard for the fact that such witness has been so convicted, insofar as such fact may affect his credibility as a witness.

This instruction was correct in its statement of law, and the defendant was entitled to have the jury instructed that the testimony of the convicts Majerczak and Hamby, who had been several times convicted of felonies, was to be received with extreme caution. The Court did give its own instruction, Number 13, but this instruction instead of serving as a cautionary instruction, had the effect of building up the credibility of such witnesses, and was erroneous in that regard. The Court did not mention the names of said witnesses Majerczak and Hamby, and we believe that the defendant was entitled to have the jury especially cautioned with respect to the credibility of their testimony. The defendant was entitled to have an instruction substantially in the form of the above instruction, and we contend the Court erred in refusing the same.

REFUSED INSTRUCTION D-8.

The Court instructs the Jury that the witness Burger is a person who has been convicted of a felonious crime.

The Court further instructs the Jury that the testimony of a witness who has been convicted of a felony is to be considered by the Jury with caution and with due regard for the fact that such witness has been so convicted, insofar as such fact may affect his credibility as a witness.

The above instruction, relating to the witness Burger, was in proper form, and should have been given to the jury by the Court. The defendant was entitled to have the jury informed that the witness Burger had been convicted of a felony, and that his testimony should be considered with caution, etc. We contend it was error for the Court to refuse to give this instruction, no other instruction having been given upon the matter in proper form.

REFUSED INSTRUCTION D-15.

> The jury are instructed further that the presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but it is an essential and substantial part of the law of the land, and binding upon the jury in this case; and it is the duty of the jury to give the defendant in this case the full benefit of that presumption.

The above is a stock instruction, and in proper form. While the Court gave an instruction, Number 6, regarding the presumption of innocence, it did not emphasize the duty of the jury in this respect as is done in the above instruction. In a trial for treason, we believe the defendant should be given the benefit of such an instruction, and that it was improper for the Court to refuse the request.

REFUSED INSTRUCTION D-16.

> The burden of proof never shifts from the prosecution to the defendant, but it is upon the prosecution throughout the case to establish every constituent element of the crime of treason beyond a reasonable doubt and by such proof as is required by the Constitution of the United States.

This instruction is also a stock instruction, and the defendant was entitled to have it given upon his request. No other instruction covered this point.

REFUSED INSTRUCTION D-17.

The Court charges the jury that before they can convict the defendant, the evidence must be so strong as to convince each juror of his guilt beyond a reasonable doubt; and if, after considering all of the evidence, a single juror has a reasonable doubt of defendant's guilt, arising out of any part of the evidence, then they cannot convict such defendant.

The above instruction is likewise a stock instruction, which the defendant in a criminal case is entitled to have given to the jury. No other instruction covered this point.

REFUSED INSTRUCTION D-19.

The Court instructs the jury that in treason there must be not only an act of adherence to the enemies of the United States, giving them aid and comfort, but there must be an intention on the part of the accused person to consciously adhere to the enemies of the United States and to give the enemies of the United States aid and comfort by the act in question. There must be proof beyond a reasonable doubt not only of the overt act charged, but of the treasonable intent of the accused person in the commission of that act.

We respectfully submit that the Court committed grave error in refusing to give this instruction to the jury on behalf of the defendants. This instruction was a proper statement of law upon the important matter of the proof necessary to convict the defendant of treason, and advised the jury that in treason there must be "an act of adherence to the enemies of the United States, giving them and and comfort," and that there must be an intention on the part of the accused person to consciously adhere to the enemies of the United States and give them aid and comfort by the act in question, and calls the jury's attention to the

principle of law that there must be not only proof of the overt act charged, but also proof of the treasonable intent of the accused person in the commission of that act. The Court in its charge gave no instruction that adequately or properly covered the statement of law contained in this refused instruction, and we believe that it was reversible error for the Court to refuse to give our instruction. Upon the other hand, as we have shown, the Court's charge to the jury upon these matters was substantially inadequate and to a large extent incorrect as a statement of law. The Court did not give a proper and complete statement of the law as covered in this instruction.

REFUSED INSTRUCTION D-21.

> The Court instructs the jury that if you believe from the evidence in the case that the defendant gave food, shelter, or other personal assistance to Herbert Haupt during the period from June 17th, 1942, to July 17th, 1942, but that such food, shelter and assistance was given to the said Herbert Haupt personally, as to a son, or friend, without any intention on the part of the defendant to aid the enemies of the United States in levying war against the United States, then the giving of such food, shelter and personal assistance to the said Herbert Haupt would not amount in law to the crime of treason.

The defendant was entitled to have the above instruction given to the jury. No instruction given by the Court properly or sufficiently covered the matters contained therein. The defendant was entitled to have an instruction to the jury applying the law with respect to the particular charges in the indictment, where such charges formed a substantial portion of the overt acts which were submitted to the jury. Instead of giving this instruction, the Court

gave other instructions, Numbers 53, 54 and 63, which definitely excluded the defense theory covered by this instruction. We contend the defendant was seriously prejudiced by the refusal of Court to give this instruction.

The above instruction, together with requested instructions D-3, D-4 and D-12, dealt with a principal defense theory, namely, that whatever was done by the defendant with respect to his son, Herbert Haupt, was done only to aid or comfort him as an individual, without any intention to give aid and comfort to the enemies of the United States. We contend that it was error for the Court to refuse to give said instruction D-21.

REFUSED INSTRUCTION D-22.

> Statements made by the defendant before this country's entry into the war, insofar as they may have indicated sympathy or preference for Germany or any criticism of the policy of the United States with respect to the war, were, as a matter of law, entirely lawful and proper, and the jury should not consider such statements as any evidence of treasonable intent.

We believe it was error for the Court to refuse to give this instruction. Not only did the Court fail to give an instruction that the jury should not regard such pre-war statements as any evidence of treasonable intent, but the Court did the opposite, and instructed the jury in instruction Nos. 58 and 60 that they might consider such statements of the defendant in determining the question of his treasonable intent.

(c) Overt Acts Submitted to Jury.

The overt acts, submitted to the jury in this case, charge as treason three groups of acts, namely:

1. Accompanying Herbert Haupt for the purpose of assisting him in securing employment (Overt acts 10 and 11);
2. Harboring and sheltering Herbert Haupt (Overt acts 12, 17, 20, 21, 22 and 23);
3. Accompanying Herbert Haupt to an automobile sales agency, arranging and completing arrangements and paying for the purchase of an automobile for Herbert Haupt (Overt acts 13, 14, 15 and 16).

To each one of these acts a treasonable intent has been ascribed in the indictment.

The overt acts (which were submitted to the jury) as specified in the indictment, grouped in the order above mentioned, are as follows:

GROUP ONE.

"10. Said Hans Max Haupt, on or about June 22, 1942, accompanied said enemy, Herbert Haupt, to the home of Andreas Conrad Grunau, 6361 Leoti Avenue, Chicago, Illinois for the purpose of assisting the said Herbert Haupt in securing employment so that the said enemy might conceal his identity and mission as an agent of the German Reich and be permitted and enabled to carry out and pursue his said mission."

"11. Said Hans Max Haupt, on or about June 22, 1942, accompanied the said Herbert Haupt to the home of Heinrich Koch, 7240 N. Odell Avenue, Chicago, Illinois, for the purpose of further assisting said enemy in procuring employment, so that he might conceal his identity and mission as an agent of the Government of the German Reich and be permitted and enabled to carry out and pursue his said mission."

GROUP TWO.

"12. Said Hans Max Haupt, on or about June 22, 1942, harbored and sheltered the said enemy, Herbert Haupt, at the home of Hans Max Haupt and Erna Haupt, 2324 N. Fremont Street, Chicago, Illinois, well knowing that the said enemy was an agent of the Government of the German Reich in the United States to commit sabotage, act as a spy and perform other services for said Government as aforesaid, all with the intent and for the purpose of assisting said enemy, Herbert Haupt, in carrying out his mission as an agent of the Government of the German Reich as aforesaid."

17, 20, 21, 22 and 23: The language of each of these overt acts is substantially the same as in overt act No. 12, with variations as to dates of the acts.

GROUP THREE.

"13. Said Hans Max Haupt, on or about June 23, 1942, accompanied the said enemy Herbert Haupt to the Warner Motor Sales, 958 Diversey Parkway, Chicago, Illinois, to arrange for the purchase of an automobile for the said enemy Herbert Haupt, with the purpose and intent of assisting the said enemy in carrying out his mission as agent of the Government of the German Reich as aforesaid."

"14. Said Hans Max Haupt on or about the 23rd day of June, 1942, while at the Warner Motor Sales, 958 Diversey Parkway, Chicago, Illinois, signed a financial statement and an order for the purchase of an automobile and made an initial payment of money toward the purchase of said automobile, with the intent and for the purpose of procuring an automobile for the said enemy, Herbert Haupt, and with the intent and for the purpose of assisting the said enemy, Herbert Haupt, to carry out his mission as an agent

of the Government of the German Reich, as aforesaid, and to conceal the identity of Herbert Haupt as such agent."

"15. Said Hans Max Haupt on or about June 24, 1942, again accompanied the said enemy Herbert Haupt to the Warner Motor Sales, 958 Diversey Parkway, Chicago, Illinois, to complete the arrangements for the purchase of an automobile for the said enemy with the intent and purpose of assisting said enemy in carrying out his mission as an agent of the Government of the German Reich, as aforesaid."

16. Said Hans Max Haupt on or about the 24th day of June, 1942, while at the Warner Motor Sales, 958 Diversey Parkway, Chicago, Illinois, made a further payment in cash toward the purchase of an automobile for said enemy, Herbert Haupt, and completed arrangements for the purchase of said automobile and did purchase said automobile for said enemy, Herbert Haupt, with the intent and for the purpose of assisting said enemy, Herbert Haupt, in carrying out his mission as an agent of the Government of the German Reich, as aforesaid."